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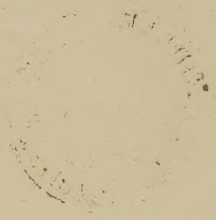

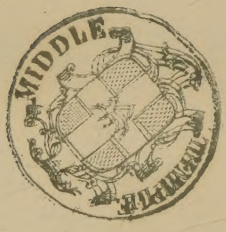
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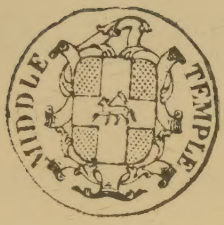

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Vol. V.

PURCHASE DEEDS.

BYTHEWOOD & JARMAN'S

SYSTEM OF CONVEYANCING.

A SELECTION OF

PRECEDENTS IN CONVEYANCING

TAKEN FROM MODERN MANUSCRIPT COLLECTIONS AND DRAFTS OF ACTUAL PRACTICE;

WITH

Dissertations and Practical Notes:

BY THE LATE

W. M. BYTHEWOOD, THOMAS JARMAN, & GEORGE SWEET,

BARRISTERS-AT-LAW.

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BY

LEOPOLD GEORGE GORDON ROBBINS,

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PREFACE

TO THE

FIFTH VOLUME OF THE FOURTH EDITION.

The whole of the Dissertation on Purchase Deeds and some of the following Precedents were in type early in last year, but the publication of this volume was suspended on the appearance of the Land Transfer and Titles Bill presented to Parliament last Session. The publication was resumed on the withdrawal of the Bill, but has been further delayed by illness of the Editor.

The question of altering the law with regard to the transfer of land and the registration of titles thereto, as was contemplated by the Bill, is one of such importance and difficulty as to deserve the most serious and careful consideration. It is impossible now to predict how long it may be before a measure for this purpose passes into law, or what form it may finally take. In any case, it may reasonably be expected that any such enactment will in the first instance be of limited application, and be gradually extended in successive districts before it applies generally to the transfer of, and titles to, land throughout the whole country. This course was contemplated by the recent Bill, and is obviously rendered expedient by considerations of the delay and expense to which transactions relating to

land would be subject, if all titles were required at once to be thrown upon the registry. It therefore seems probable that for some years to come, at any rate, recourse will be necessary to the present modes of transferring land, and the Editor ventures to hope that during that period the present volume may be of some service to the legal profession.

The Editor takes this opportunity of expressing his grateful acknowledgments to Mr. R. Booth, of Lincoln's Inn, by whom the greater part of the Dissertation on Purchase Deeds was in the first instance written, and who has also assisted in collecting materials for and settling some of the Precedents under that heading; also to Mr. H. M. Keary and Mr. A. Turnour Murray, both of Lincoln's Inn, for valuable assistance by way of suggestions and advice, and in revising the sheets of this volume for the press.

L. G. GORDON ROBBINS.

4, Stone Buildings, Lincoln's Inn,
January, 1888.

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ADDENDA ET CORRIGENDA.

Page 19, line 9. *Add:* See also *Re Freshfield's Trust*, 11 Ch. D. 198. Notice to an official liquidator of an assignment of a debt due from the Company is sufficient to perfect the assignment: *Re Breach-loading Armoury Co.*, L. R., 3 Eq. 284.

,, 34. *Devolution of mortgage and trust estates in Copyholds.*]—By sect. 35 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73), it is enacted that "The thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant or the court rolls of any manor upon any trust or by way of mortgage": see *Re Mills' Trusts*, W. N., 1887, p. 253.

,, 48, note (*e*) (See also p. 519, note (*g*)). *Enrolment in Mortmain.*]—By the stat. 31 & 32 Vict. c. 44, conveyances to trustees, societies, or associations, for purposes of religion, education, arts, literature, or other like purposes, of land, not exceeding two acres in extent, for buildings to be erected and used for such purposes are exempted from the operation of the Mortmain Acts. In *Burnaby* v. *Barsby*, 4 H. & N. 690, it was held that where the churchwardens and overseers of a parish had a statutory power to purchase land for building a workhouse, and to resell the land, or so much as should not be required for the purpose, the conveyance to them did not require enrolment. But this decision has been questioned by *Kay*, J., in the recent case of *Webster* v. *Southey*, 36 Ch. D. 9. The question, therefore, cannot be regarded as free from doubt whether a conveyance to a local authority for a public purpose, being charitable within the stat. 43 Eliz. c. 4 (see *ante*, Vol. IV. pp. 39 n., 50), is exempt from the necessity for enrolment in mortmain.

,, 70, note (*zz*). *Infant Tenant for Life—Sale of Settled Lands.*]—Where, there being no trustees of a settlement within the meaning of the Settled Land Act, 1882, persons have been appointed by the Court under sect. 60 of the Act to exercise the powers of the Act on behalf of an infant and to sell the settled lands, the persons so appointed can make out a good title to a purchaser without any necessity for appointing trustees of the settlement for the purpose of receiving notice of the intended sale; but the persons so appointed cannot give effectual receipts for the purchase-money, which must be paid into Court: *Re Countess of Dudley's Contract*, 35 Ch. D. 338.

,, 77, line 1. *For* "19 & 20 Vict. c. 70," *substitute* "40 & 41 Vict. c. 18, sect. 49."

,, 88, note (*n*). *Add:* "In *Kerford* v. *Seacombe Hoylake, &c., Rail. Co.*, W. N., 1888, p. 11, it was held that stables built on the south

side of a private road opposite to and occupied with a house situate on the north side of the same road, were not part of the house within the meaning of sect. 92 of the Lands Clauses Act, 1845.

Page 86, line 6. As to enrolment in mortmain, *vide supra Addendum* to p. 48, note (*e*).

,, 162, line 3 from end. *For* "sect. 52" *substitute* "sect. 132."

,, 189, line 18. *Add:* "In *Hall* v. *Byron*, 4 Ch. D. 667, it was held that general words in a conveyance of enfranchised copyholds were sufficient to revive rights of common."

,, 193, line 23 (see also p. 550, note (*z*)). *Rights of riparian proprietors.*] —The presumption that a conveyance of land described as bounded by a river passes the bed of the river *usque ad medium filum aquæ* is rebuttable by proof of circumstances negativing the possibility of such having been the intention of the parties : *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263.

,, 194, line 5. *Add:* "*Thomas* v. *Owen*, 20 Q. B. D. 225."

,, 296, line 11. *Extent of doctrine in Tulk* v. *Moxhay.*]—Reference may be made, with regard to this question, to the recent decision in the Court of Appeal in *Hall* v. *Ewin*, 37 Ch. D. 74.

,, 321, marginal note. *For* "upon admittance" *substitute* "until admittance."

,, 341, line 30. The enactment here mentioned has been repealed, but the right of the steward to fees before admittance has been reaffirmed by the Stamp Act, 1870, sect. 86.

Jarman and Bythewood's

PRECEDENTS IN CONVEYANCING

PURCHASE DEEDS.

PRELIMINARY DISSERTATION.

CHAPTER I.

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1. Of Purchase Deeds Generally.

Purchase Deeds generally.

What is a purchase deed.

The title "purchase deeds" includes every species of assurance under seal by which real or personal property is capable of being conveyed or transferred by way of sale, as grants, feoffments, bargains and sales enrolled, appointments, lease and release, demises, assignments, surrenders, and the like. For the purposes of stamp duty the term "conveyance on sale" has a wider signification, and includes

Purchase Deeds generally.

vesting orders, &c.; even a document which merely operated as a record of the transfer of property was, in *Horsfall* v. *Key*, 2 Exch. 778, held to be a conveyance on sale within the meaning of the Stamp Act then in force (55 Geo. 3, c. 184) (*a*).

Modern conveyances.

By the operation of legislation, to which reference will be hereafter made, several of the varieties of purchase deeds above referred to have been rendered obsolete in practice. The form of deed usually employed in the transfer of freehold real estate is that commonly known as a grant, while copyholds are transferred by surrender and admittance as of old, and personal property passes by assignment (*b*).

Acquaintance with the old forms of purchase-deeds still useful to conveyancers.

Hence it is not now so essential as formerly that the conveyancer should be intimately acquainted with the history of the process, by which the various systems of conveyancing, and the several forms of deeds were evolved. But, though much of this historical learning has now been rendered practically obsolete so far as the preparation of purchase deeds is concerned (*c*), it is still of something more than merely antiquarian interest, for the nature and effect of the simplified forms of deeds now in use cannot be properly understood except by its assistance. It is therefore proposed to give, in this chapter, a very brief sketch of the development of conveyances, and to refer the reader for further information to the extensive store of learning as to the nature and operation of various forms of purchase deeds contained in previous editions of this work.

2. As to Purchase Deeds of Freeholds.

Ancient mode of conveying freeholds.

Feoffments.]—There appears to be little doubt that the transfer of property in land was originally effected

(*a*) See also *Heseltine* v. *Leggers*, 1 Exch. 857; *Tarling* v. *Baxter*, 6 B. & C. 364; *Dixon* v. *Yates*, 5 B. & Ad. 340; *Alexander* v. *Gardner*, 1 Scott, 630; and compare *Toll* v. *Lee*, 4 Exch. 230; *Beeching* v. *Westbrook*, 8 M. & W. 411; *Knight* v. *Barber*, 16 M. & W. 69; and *Fancourt* v. *Thorn*, 9 Q. B. 312.

(*b*) Sealing and delivery are necessary to make a deed: signing is not: see *Cooch* v. *Goodman*, 2 Q. B. 580.

(*c*) Of course the old forms of deeds are occasionally met with in the perusal of abstracts of title.

Feoffments.

by means of the delivery of a symbol of possession, such as a turf or a twig, upon the land, accompanied by a more or less set form of words. In early days, with the view of preventing question as to the ownership of land, a high importance was attached to notoriety in connection with its transfer. Hence the ceremonies required for a valid conveyance were somewhat elaborate. When the feudal tenure was imposed upon English land, this process of transfer was in the main retained, and was termed a "feoffment." The function of writing, when writing was employed in connection with feoffments, was to preserve a solemn record of the transaction. Deeds were thus evidence and muniments of title in the strict sense.

Nature and effect of feoffments.

A feoffment would seem to have been the earliest form of conveyance known to English law (*d*), and of this conveyance the deed formed no part. The essential element in a feoffment was the livery of seisin, that is, the delivery to the purchaser of the feudal possession of the freehold. Deeds in connection with feoffments gradually became more and more important as they were made use of, not only to preserve evidence of the feoffment itself, but also to declare uses and trusts, and to record the limitations of the estates conferred by the feoffment. And by the Statute of Frauds (29 Car. 2, c. 3), a feoffment made by livery of seisin only, and not accompanied by an instrument in writing signed by the feoffor or his agent lawfully authorised in writing, has the effect of creating an estate at will only: see *ante*, Vol. I., p. 272.

Feoffments have long ceased to be a usual method of conveying land. They were, until the passing of the Act for Amending the Law of Real Property (8 & 9 Vict. c. 106), used as conveyances by corporations, owing to the doubt as to whether a corporation could be seised to a use; and some corporations still employ this form of conveyance. Feoffments are also occasionally made at the present day for the purpose of a conveyance by infants of property which

(*d*) See Byth. & Jarm. Conv. (3rd ed.) sub tit. FEOFFMENTS.

Feoffments.

they have acquired by descent under the custom of gavelkind: see as to such feoffments, 4 Bac. Abr. 49, 50; see also *post*, p. 66.

Tortious operation of feoffments.

One peculiar property of feoffments was that they had a tortious operation when made by one in possession though not the owner. It appears to have been in later times mainly useful in turning a long term of years into a fee, an object which may now be secured by the prescribed process under the 65th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), as to which see *ante*, Vol. II., sub tit. "ENLARGEMENT OF TERMS," p. 912.

8 & 9 Vict. c. 106, s. 4.

Section 4 of the Act for the Amendment of the Law of Real Property (8 & 9 Vict. c. 106) provides that:—

> "A feoffment made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation."

With respect to the tortious operation of feoffments, see *Weller* v. *Stone*, 54 L. J. Ch. 497.

Consideration.

The common law regarded solely the transfer of the seisin, and consequently did not demand that there should be a consideration to support it. The mere feoffment of a stranger by the owner sufficed, so far as the law was concerned with the transaction, to transfer the land to the stranger. Equity however held, that in order to transfer the beneficial interest, there must be a declaration of the use, *i.e.*, the destination of the beneficial interest, or else a consideration moving from the stranger to raise a presumption that the use was to belong to the person enfeoffed.

Of uses generally.

The Statute of Uses.]—Inasmuch as equity would compel the performance by the feoffee of any use declared upon a feoffment, it became a very simple matter to evade the mortmain laws, and to keep the actual beneficial ownership of land secret. To such a pitch had this practice grown, that when, for political considerations, it was determined to destroy the power of the monasteries and other religious corporations, the legislature interfered and passed the Statute

of Uses, 27 Hen. 8, c. 10. The preamble to that important statute has the following words concerning the execution of the use :— Statute of Uses.

"Where, by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made bonâ fide, without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices, have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometimes made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids pur fair fitz chivalier, & pur file marier, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers; manifest perjuries by trial of such secret wills and uses have been committed; the King's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness, or any other his subjects of this realm, shall not in anywise hereafter by any means or inventions, be deceived, damaged, or hurt, by reason of such trusts, uses, or confidences."

Statute of Uses.

The possession of lands shall be in him or them that have the use.

To remedy these varied mischiefs it was accordingly enacted:—

"That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments (*e*), to the use, confidence, or trust, of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner, means whatsoever it be; that in every such case, all and every such person or persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust, in remainder, or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust, that was in them."

The second section contains similar provisions with respect to the case of several persons jointly

(*e*) This statute does not extend to the Isle of Man: see 4 Inst. 284, and *Bishop of Sodor and Man* v. *Earl of Derby*, 2 Ves. sen. 337. Estates for years cannot be conveyed to uses so as to be executed into legal estates by the statute, because the words of the statute are "where any person shall be seised," and a lessee for years is not seised, but only possessed; for the word "seisin," in the language of the law, is exclusively applied to estates of freehold and inheritance; Litt. s. 324; Co. Litt. 200 b; because there needs no levying of seisin to be made to the lessee. But where one is seised in fee, he may convey to uses for years; and such use would be executed by the statute, so as to vest a legal estate for years in the termor. So a lessee for years cannot convey his estate at law by a bargain and sale, because the use raised by such contract is not founded on any seisin within the statute.

Statute of Uses.

seised to the use, confidence, or trust of any of them.

Interpretation put on the statute by Courts of Equity.

The intention of the legislature clearly was to prevent for the future any attempt being made to effect conveyances which should have in them any appearance of secrecy, and to compel all conveyances to be made directly to the person who was intended to be the *bonâ fide* beneficial owner. This object was, however, speedily defeated by the action of the courts of equity (*f*), which decided that there could not be a use upon a use, and that the statute having operated once in executing the use and turning it into the legal seisin, was thenceforth *functus officio*. It therefore became once more possible, by the addition of a further use, to create trust estates with as great facility as before.

It has been said (*g*) that this doctrine must have surprised everyone "who had not lost his common sense"; but it may perhaps be presumed that the feudal tenure was already becoming less reverenced, and that its rigidity was felt to be too great a bar to dealings with land. If this were so, it may be doubted whether the courts of equity were not acting in accord with common sense, while apparently contravening it, in order to circumvent the legislation of a feudal parliament. It may be remembered that the history of estates tail exhibits the same struggle between the legislature on the one hand, and common sense and the necessities arising from the growing complexity of social arrangements on the other.

Tenant in possession could acquire freehold reversion by release, without livery of seisin.

Bargain and Sale, and Lease and Release.]—A consequence of the Statute of Uses was that it gave rise to the modern conveyance by lease and release: as to which see *post*, p. 9. Already a form of conveyance by lease and release had been in use. A lessee for years, though in possession of the land held by him, was not considered to have the feudal

(*f*) See Byth. & Jarm. Conv. (3rd ed.) sub tit. "COVENANTS TO STAND SEISED TO USES." These instruments have long fallen into disuse.

(*g*) Watkins' Principles of Conveyancing, Introduction.

Bargain and Sale.

possession or seisin. But being in actual possession there was no occasion for any livery of the seisin to him, nor indeed would any livery have been possible unless he surrendered his lease. It was therefore necessary for him to acquire his landlord's interest in some other manner, and this was effected by means of a deed called a release. Leases for years were not unfrequently granted for the express purpose of afterwards releasing the landlord's interest to the lessee; but it was necessary that the tenant should actually enter under his lease, and this necessity for entry by the lessee prevented the extensive employment of this form of conveyance.

It was therefore necessary to devise means of granting a lease in some form which should vest the possession in the tenant without actual entry. The machinery to effect this purpose was discovered in an instrument already well known and called a "Bargain and Sale."

Bargain and sale.

A bargain and sale (*h*) was nothing more than a contract. A contract for the sale of land, when the purchase-money was paid, was held by the courts of equity to entitle the purchaser to the use of the lands without further ceremony. Upon the passing of the Statute of Uses, it was held that the use so raised upon a bargain and sale of freeholds was executed in the purchaser; and that by the mere contract followed by payment of the purchase-money the feudal seisin was vested in the purchaser. The Statute of Uses accordingly defeated its own ends, and enabled secret conveyances to be made with greater facility than before.

Statute of Inrolment.

The legislature again interfered and passed the Statute of Inrolment (*i*), the object of which was to compel all bargains and sales of estates of inheritance or freehold (which theretofore might have been by parol) to be made by deed indented, and further to require them to be enrolled in a court of record. The obvious intention was to secure full publicity for all conveyances of land. But the legislature

(*h*) See Byth. & Jarm. Conv. (3rd ed.) sub tit. "Bargain and Sale."

(*i*) Stat. 27 Hen. 8, c. 16.

Bargain and Sale.

again failed to secure the desired object; for the Act applied only to estates of inheritance or freehold, and not to estates for years. Hence, notwithstanding this statute, upon a bargain and sale for years, the use raised by the consideration was immediately executed by the Statute of Uses, so that the bargainee was at once in legal possession for the term of years granted him under his contract, and capable of receiving the seisin by a mere release.

Bargain and sale in fee.

A bargain and sale by deed enrolled pursuant to the stat. 27 Hen. 8, c. 16, may be made in fee simple, and this mode of conveyance is still occasionally employed. It has the advantage that by the stat. 10 Anne, c. 18, sect. 3, an office copy of the enrolment is good evidence of the contents of the original deed. The effect of the bargain and sale is to pass the whole legal estate of the bargainor to the bargainee by virtue of the Statute of Uses, the bargainor becoming seised to the use of the bargainee and his heirs. A bargain and sale to A. to the use of B. would vest in the latter only an equitable estate, being a use upon a use. The bargain and sale therefore, or lease for a year, as it was generally called, operated, and the bargainee had a vested estate by the Statute of Uses, divided from the reversion.

Conveyance by lease and release.

The problem of conveying to a purchaser the feudal seisin of land, without any need for actual physical entry on the land, having been thus solved, the legislature seems to have accepted the position, and thenceforth intervened only with the view of facilitating the transfer of land: and the contrivance of a lease and release (*j*) was the usual mode of conveying land down to the year 1841. In that year was passed the Act for "rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties." This Act, 4 & 5 Vict. c. 21, enacts (sect. 1) as follows:—

A release to be effectual although no

"That every deed or instrument of release of a freehold estate, or deed or instrument purporting or intended to be a release of a

(*j*) See Byth. & Jarm. Conv. (3rd ed.) sub tit. "BARGAIN AND SALE."

Lease and Release.

lease for a year shall be executed.

freehold estate or interest, which shall be executed on or after the fifteenth day of May, one thousand eight hundred and forty-one, and shall be expressed to be made in pursuance of this Act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and sale or lease for a year for giving effect to such release, although no such deed or instrument of bargain and sale or lease for a year shall be executed."

Grants.

Grants.]—It is not to be wondered at that this plan for shortening the cumbrous modes of conveyancing then in use was felt to be unsatisfactory; and four years later, the Act 7 & 8 Vict. c. 76 was passed, by which it was enacted that any land which formerly could be conveyed by lease and release should be capable of being conveyed by any deed, without livery of seisin, or a lease for a year; and nine months later the legislature, by the Act 8 & 9 Vict. c. 106, s. 2, adopted the only satisfactory method of dealing with this question, by discarding once and for all the feudal notions with relation to the conveyance of freeholds, and altering the nature of corporeal tenements and hereditaments to the extent of declaring that thenceforth they should be deemed to lie in grant as well as in livery. The section is as follows:—

The immediate freehold of corporeal tenements to lie in grant as well as in livery.

Sect. 2. "After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

With reference to the phrase "as regards the conveyance of the immediate freehold," it should be remembered that a reversion or remainder upon the immediate freehold, or even upon an estate for years, would always pass by release or grant; so that the section, though apparently limited in its operation, is yet sufficiently extended; seeing that it was the immediate freehold alone which did not already lie in grant.

From this statute it resulted that an ordinary

Grants.

deed of grant (*k*) became the sufficient means of conveying freeholds and other corporeal hereditaments (other than copyholds) as well as incorporeal hereditaments. The only matter essential to the validity of the conveyance being that it should be by deed (see sect. 3 of the Act), land is now transferable by the observance of only such forms or solemnities as are included in the execution of an ordinary deed.

This state of the law has not been altered by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), though that statute has made many and extensive changes in the form of deeds of conveyance. The points in which changes have been so made will appear from the subsequent pages of this Dissertation. It must suffice in this place to note that the final form of conveyance as yet, is that of a simple grant (*l*).

Former modes of conveyance still valid.

It may be here observed that, though the various forms of conveyance which have been touched upon have fallen into disuse, they would be still, if used, of valid force. It is still open to the parties, if they care to do so, to convey land with all the formalities requisite to a valid feoffment, or to employ a bargain and sale enrolled, or a lease and release. And, as has been seen, some of these modes of conveyance have not altogether fallen into disuse.

3. As to Conveyance by Way of Sale of Copyholds.

Copyholds.

Copyholds are lands holden by the tenants of a manor at the will of the lord. The seisin of the land is in the lord; and the tenant has no estate therein except an estate at will, though by reason of the binding effect of custom, the tenure at the will of the lord has for many centuries become a very certain tenure. The seisin of the lord carries with it many substantial advantages: in fact his

(*k*) See Byth. & Jarm. (3rd ed.) sub tit. Grants.

(*l*) The use of the word "grant" is not necessary to convey lands or hereditaments: see *post*, p. 162.

Conveyance on Sale of Copyholds.

rights in the land are the same as those which are usually incident to an estate in fee simple in lands, though these rights are, in their exercise, controlled by the custom of the manor, which is the safeguard of the copyholder. Thus the lord is generally the owner of all mines and minerals in the land, and also of all timber, even though planted by the copyholder: *Bowser* v. *Maclean*, 2 De G., F. & J. 415; *Eardley* v. *Granville*, 3 Ch. D. 826; nor may a copyholder commit waste, either voluntary or permissive: *Doe* d. *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507.

Tenure of copyholds.

Copyholds are said to be held by copy of Court Roll, and at the will of the lord. The latter condition imports the original insecurity of tenure; and by virtue of custom the lord is still entitled to receive fines upon occasions on which, originally, he was accustomed to exact such contributions from his tenants: the most usual of these occasions are upon the occurrence of any change in the tenancy whether by reason of death, or of alienation *inter vivos*.

Court rolls.

The former of the two conditions above referred to is of perhaps greater importance with respect to the conveyance of copyholds, for in it is embodied the main fact with regard thereto, that all transactions of whatever kind with respect to copyholds are bound to appear upon the rolls of the manor to which the copyholds belong. Copyholds are still conveyed by the same method as that originally employed, and that method carries upon its face its own explanation. The estate of the tenant having been originally an estate at the will of the lord, the tenant could not transfer his estate to another without the consent and active intervention of the lord. The nature of the Customary Court of a manor seems not a suitable matter for discussion in this place; it may suffice to remark that its office was, and still is, to bring under the notice of the lord all acts and occurrences affecting his interests so far as relates to the copyhold portion of his manor and the tenants thereof. At the Customary Court all changes in the tenancy are presented by the homage, and records of these presentments, and of other matters, are entered in books kept by a

Conveyance on Sale of Copyholds.

proper person. These are then the essentials to an alienation, *inter vivos*, of copyholds: first the lord and his tenant, and secondly, the Court Rolls.

Alienation of copyholds.

The usual mode of alienation of copyholds is by surrender by the tenant of his estate into the hands of the lord, and an admittance by the lord of the alienee; the due and customary record of this transaction being entered upon the rolls by the steward. The practical operation of custom has been to render it imperative on the lord to accept the alienee in substitution for the tenant surrendering.

Surrender.

When the surrender is made in court, the minute thereof is entered upon the Court Rolls, and a copy of the minute is made by the steward and handed to the alienee as the evidence of his title. But if the surrender is made out of court, a memorandum of the transaction is drawn up and duly signed, and this memorandum is then in due course entered upon the Court Rolls. Formerly it was necessary that there should be a presentment of the alienation in court before the proper entry could be made upon the Court Rolls, but by stat. 4 & 5 Vict. c. 35, s. 89, it is provided that surrenders shall be forthwith entered on the Court Rolls, and entries so made are to be deemed to have been made in pursuance of a presentment by the homage.

It is to be observed that the surrender does not take out of the surrenderor the estate vested in him; he remains tenant to the lord until the admittance of the surrenderee. The right of the surrenderee is an inchoate right which must be completed by admittance: *Wilson* v. *Weddell*, Yelv. 144; *Doe* d. *Tofield* v. *Tofield*, 11 East, 246; *Rex* v. *Dame Jane St. John Mildmay*, 5 B. & Ad. 254; *Doe* d. *Winder* v. *Lawes*, 7 A. & E. 195. It has been suggested that this right of the unadmitted surrenderee is a contingent interest alienable by deed within stat. 8 & 9 Vict. c. 106, s. 6; but it is not an interest in the land, and therefore appears to be outside the scope of this enactment. His right is neither *in re* nor *in rem*, but merely *in personam*: *Wilson* v. *Weddell*, Yelv. 144; *Wain-*

Conveyance on Sale of Copyholds.

wright v. *Elwell*, 1 Madd. 634. At law he had only a right (and that of modern origin) against the lord, to the interference of the Queen's Bench to compel the lord to do certain acts which will confer an estate: *Ford* v. *Hoskins*, Cro. Jac. 368; *Rex* v. *Coggan*, 6 East, 431; *Rex* v. *Powell*, 4 Per. & D. 719. In equity his interest is distinguishable from an equitable interest in copyholds: *Williams* v. *Lonsdale*, 3 Ves. 752; *Phillips* v. *Phillips*, 1 My. & K. 649. He certainly has, as against the actual tenant, an equitable title or interest which he might always have passed by contract for valuable consideration: *Wainwright* v. *Elwell*, 1 Madd. 627; *King* v. *Turner*, 1 My. & K. 456; *Phillips* v. *Phillips*, 1 My. & K. 649; *Lewis* v. *Lane*, 2 My. & K. 449; *Sowerby* v. *Gutteridge*, 18 L. J. Ch. 9. This inchoate right might also always have been released to the actual tenant of the lands: *Kite and Queinton's Case*, 4 Rep. 25 a.

Admittance.

The surrenderee is entitled at any time after the surrender to procure his admittance. Upon admittance he becomes tenant to the lord, in place of the surrenderor, and must pay the customary fine. The surrenderee is usually admitted immediately after the surrender is made; but if the admittance be delayed, it has relation back to the surrender. The admittance may be made out of Court under the provisions of stat. 4 & 5 Vict. c. 35, ss. 88, 90.

Now that the necessity for an actual presentment by the homage of the surrender no longer exists, the conveyance of copyholds has become comparatively simple; and the entry of any transaction relating to copyholds upon the Court Rolls renders the title to them easy of investigation, and removes it from possibilities of fraud which still attach to the title to freeholds.

Equitable estates in copyholds.

Equitable estates may exist in copyholds, as they may in freeholds. In these cases, the equitable owner is not the tenant to the lord: the trustee is the tenant, and it is his name which is upon the Court Rolls. This being so, the *cestui que trust* can transfer his interest by deed in any manner adapted to the transfer of equitable interest in land, but he

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cannot do so by surrender. There are two exceptions to this rule. An equitable estate tail may be bound by surrender or by deed: stat. 3 & 4 Will. 4, c. 74, s. 50; and by sect. 90 of the same Act a husband and wife may surrender any copyhold land to which she, or her husband in her right, is entitled for an equitable estate, in the same manner as if her estate had been an estate at law. A fuller discussion of these cases will be found *infra*, sub tit. "SETTLEMENTS," where will also be found a notice of the other interests which may exist in copyholds, such as remainders and interests created by executory devise.

It will be noticed that no change has taken place in the processes by which copyholds are conveyed, except that the necessity for actual presentment by the homage at a Customary Court has been done away with, and that in their essence conveyances of copyholds are the same as they have been from time immemorial. In certain respects, such as the mutually restrictive rights of lord and tenant, the incidence of fines, the liability to heriots and the like, the copyhold tenure is not so satisfactory as the freehold tenure; and the necessary application to a third party to render complete the sale and purchase entered into by a tenant and his alienee is often felt to be inconvenient. The result is that the tenure is viewed with something of impatience; and it is probable that before many years are passed all copyholds will have been enfranchised.

Customary freeholds.

Customary freeholds are lands held by copy of Court Roll, though not at the will of the lord. There has been much discussion as to the exact status of this tenure, and as to its incidents. It has, however, been now decided that the freehold in land of this tenure is in the lord and not in the tenant: *Stephenson* v. *Hill*, 3 Burr. 1278; *Doe* d. *Reay* v. *Huntington*, 4 East, 271; *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Burrell* v. *Dodd*, 3 Bos. & P. 378; *Thompson* v. *Hardinge*, 1 C. B. 940. Lands of this tenure appear to be alienated by methods depending upon the custom, the documents being entered upon Court Rolls in the same way as surrender and admittances of copyhold lands.

4. As to the Sale and Purchase of Personal Property.

Sale of Personal Property.

Personal property.

The law relating to land and the application thereto of feudal principles arrived at a state of great elaboration long before the rules affecting personal property became important. These rules remained for a long period few and simple in their nature, owing to the fact that personal property was not of an extensive kind, nor held to be of much importance.

Chattel interests in land, or chattels real.

Leases for years or chattel interests in lands, commonly called "chattels real," were of a comparatively modern origin, and the laws of tenure did not apply largely to them; consequently, until the Statute of Frauds, leasehold interests could be created and transferred by parol. As distinguished from chattels real, all other classes of personal property came to be known as personal chattels.

Personal chattels.

Of personal chattels some are corporeal, as furniture, ships, moveable articles, and the like; others are incorporeal, as debts and other choses in action. Of these, again, some are legal; others equitable, as a pecuniary legacy.

In addition to these, various kinds of personal property have been created by the exigencies of modern commerce and society, such as shares, funds, stock, and so forth, which have developed fresh rules of law, or new applications of old rules, simultaneously with their own growth.

Assignment of leaseholds.

Terms of years, whether they be for long periods or merely ordinary leases, are assignable by deed. By sect. 3 of the Statute of Frauds (29 Car. 2, c. 3) it was enacted that no leases, estates, or interests, not being copyhold or customary interests, in any land, tenements, or hereditaments, should be assigned, unless by deed or note in writing, signed by the party so assigning or his agent thereunto lawfully authorised by writing, or by act or operation of law. This requirement of the legislature was afterwards (by stat. 8 & 9 Vict. c. 106, s. 3) superseded by an enactment that an assignment of a chattel interest, not being copyhold, in any tenements or heredita-

ments, shall be void at law unless made by deed. A lease which may be created by parol cannot be assigned without a deed: *Pollock* v. *Stacey*, 9 Q. B. 1035; and a demise for the whole of a term is in law an assignment: *Wollaston* v. *Hakewell*, 3 Scott, N. R. 593; *Thorne* v. *Woolcombe*, 3 B. & Ad. 586; *Smith* v. *Mapleback*, 1 T. & R. 441; *Hickes* v. *Downing*, Lord Raym. 99. Sale of Personal Property.

The variations in form between a deed assigning chattel interests in land and ordinary conveyances of freehold lands will be considered later.

Choses in possession have always been capable of alienation without restriction. They will pass by gift completed by delivery; but the delivery is in such cases essential to the transmutation of the property: *Irons* v. *Smallpiece*, 2 B. & Al. 551; *Shower* v. *Pilch*, 4 Exch. 478; *Antrobus* v. *Smith*, 12 Ves. 39; *Re Ridgway*, 15 Q. B. D. 447. But though the donor, by retaining the subject-matter of his gift, will at law render his gift void, he may, if he declares a trust of the chattel, effectually make himself trustee for the donee, so that in equity he can be compelled to perform the trust: *Ellison* v. *Ellison*, 6 Ves. 656; *Ex parte Dubost*, 18 Ves. 140; *Vanderburg* v. *Palmer*, 4 K. & J. 204; and see Lewin on Trusts, pp. 67 *et seq.* What constitutes delivery depends upon the nature of the goods: *West* v. *Skip*, 1 Ves. Sen. 244; *Chaplin* v. *Rogers*, 1 East, 190; *Stoveld* v. *Hughes*, 14 East, 308; *Young* v. *Matthews*, L. R. 2 C. P. 127; and also upon the custom of trade: *Dixon* v. *Yates*, 5 B. & Ad. 313; *Ex parte Davenport*, Mon. & Bl. 165; *M'Ewan* v. *Smith*, 2 H. L. C. 309; *Mitchell* v. *Ede*, 11 A. & E. 888. Choses in possession.

Personal chattels will pass by deed (*m*); and this method is the most effectual, as it does away with the

(*m*) An assignment or declaration of trust on a sale of goods passing by delivery, but retained in the grantor's apparent possession must now generally be effected by an instrument duly registered, and in other respects conformable to the provisions of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), by which *absolute* bills of sale are regulated; otherwise it will not be valid as against third persons. This subject will be considered in a later part of this Dissertation.

Sale of Personal Property.

necessity for delivery, and a consideration is imported in every deed: *Carr* v. *Burdin*, 1 Cr. M. & R. 782.

Ships.

Ships are transferred by bill of sale containing specified particulars, and the transferee is entered in the register as the owner of the ship. This process is governed by the enactments contained in the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the Merchant Shipping Amendment Act, 1855 (18 & 19 Vict. c. 91), the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), the Merchant Shipping Act, 1871 (34 & 35 Vict. c. 110), and the Merchant Shipping Act, 1872 (35 & 36 Vict. c. 73), and the stat. 36 & 37 Vict. c. 85; 39 & 40 Vict. c. 80; 43 & 44 Vict. c. 18. Ships are not within the Bills of Sale Acts. The discussion of this matter does not fall within the scope of the present work.

Choses in action.

Choses in action were formerly held to be inalienable. But by degrees, an assignment of a debt, together with the grant of a power of attorney, was held to authorise the assignee to sue the debtor in his own name. An assignee of a chose in action, suing at law, brought his action simply in his assignor's name, tendering to the assignor an indemnity; a practice which still holds: *Turquand* v. *Fearon*, 4 Q. B. D. 280. An assignee of an equitable chose in action was entitled to sue in his own name even though he held no power of attorney from his assignor; but if the chose in action was not equitable, he was bound to join his assignor as a party. The title of the assignee is not complete until notice of the assignment has been given to the debtor: *Dearle* v. *Hall*, 3 Russ. 1; *Re Bright's Trusts*, 21 Beav. 430 (*n*).

Judicature Act, 1873.

Under the Judicature Act, 1873, sect. 25 (6), any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing has been given to the person against whom the assignor's claim exists, is effectual in law, and gives the

(*n*) As to shares, see *Société Générale de Paris* v. *Walker*, 11 App. Ca. 20.

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assignee the right to sue without the assignor's concurrence. As to what is an absolute assignment within the meaning of the section, see *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; *Re Sutton's Trusts*, 12 Ch. D. 175; *Southwell* v. *Scotter*, 49 L. J., Q. B. 356; *Burlington* v. *Hall*, 12 Q. B. D. 347; *Percival* v. *Dunn*, 29 Ch. D. 128; *Webb* v. *Smith*, 30 Ch. D. 192; as to assignment of monies not yet due, see *Brier* v. *Bannister*, 3 Q. B. D. 569; and as to notice, see *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

It must, however, be observed that the section does not alter the law except so far as regards procedure, and does not operate to make that an assignment which was not in law an assignment before: *Schroeder* v. *The Central Bank*, 24 W. R. 710; *Re Haycock's Policy*, 1 Ch. D. 611; *Ex parte Culling*, 2 Ch. D. 307; *Ex parte Theys*, 22 Ch. D. 122.

Bills of exchange, &c.

Bills of exchange and promissory notes are also transferable without power of attorney: see stats. 3 & 4 Anne, c. 9, 7 Anne, c. 25; and so are also policies of life assurance (30 & 31 Vict. c. 144): see *Curtius* v. *Caledonian Insurance Co.*, 19 Ch. D. 534, and policies of marine assurance (31 & 32 Vict. c. 86): see *Pellas* v. *Neptune Marine Insurance Co.*, 5 C. P. D. 34.

Shares and stock.

Shares in joint stock companies are transferred in accordance with the rules of the particular company, and the transfer is registered in the books of the company. Share warrants are, however, transferred by delivery. Shares are not within the 17th section of the Statute of Frauds: *Humble* v. *Mitchell*, 11 A. & E. 205; *Knight* v. *Barber*, 16 M. & W. 66; *Bowlby* v. *Bell*, 3 C. B. 284. Special regulations are made with reference to identification upon a sale of shares in a joint stock bank: see stat. 30 Vict. c. 29.

The public funds.

Stock in the public funds is now practically nothing more than a right to receive certain perpetual annuities, which is subject to the right of the government to redeem the annuities at par. The public funds comprise several different denominations, but they are all subject to the same legal incidents. They are personal property (stat. 33 &

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34 Vict. c. 71, s. 9), and are transferable only by signature in the books at the Bank of England, either by the transferee personally, or by his attorney lawfully thereunto authorised by writing under hand and seal, attested by two or more credible witnesses (stat. 33 & 34 Vict. c. 71, s. 22).

Equitable interests in stock, &c.

The legal estate in stock in the public funds, and in shares and stock of joint-stock companies is in the registered owner thereof. When property of this nature is held upon trust, the *cestui que trust* may assign his beneficial interest in any manner he may think fit; and the assignee, if he becomes absolute owner under his transfer, will be entitled to call for a transfer from the trustee.

5. Of a Modern Conveyance by Way of Sale.

Formal parts of a purchase deed.

An ordinary purchase deed is a very simple instrument. All that is essential to its validity is that it should indicate with sufficient clearness what is the date of the deed, who is the grantor, who is the grantee, what is the property to be conveyed, and what is the estate for which the property is to be conveyed. Also, in the case of freeholds, the property must be expressly conveyed *to the use of* the purchaser. Moreover, a purchaser being entitled, unless his right is restricted by special contract, to covenants by the vendor for title, freedom from incumbrances, and further assurance, a purchase deed must generally contain such covenants either expressly or by implication. In addition to these particulars it is necessary under the Stamp Act, in order that there may be no evasion of the laws relating to revenue, that the consideration moving the grantor in making the conveyance should be truly set forth. A purchase deed must be signed, sealed, and delivered by the grantor; the execution by the grantee merely shows his assent to the grant, which will be presumed in the absence of evidence to the contrary: Co. Litt. 230, b. It is, moreover, advisable that the execution by the grantor should be attested by two witnesses,

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though this precaution is not always adopted (*n*). But though a deed would no doubt be valid, and might possibly in some cases be sufficient, which satisfied these several conditions, modern purchase deeds almost invariably contain more than the particulars which are indicated above. The usual form of a purchase deed is an indenture, but it may be a deed poll (*o*).

Parties, date, recitals, &c.

A purchase deed usually commences with an introduction in the words "This indenture," followed by a statement of the date. A deed speaks from the date of its delivery. If therefore the date of delivery is not the same as that set forth in the deed, the latter will be disregarded: see *Jayne* v. *Hughes*, 10 Exch. 430, and *post*, p. 116. The names, addresses, and descriptions of the parties are usually stated in deeds, and, though a formal statement of them may possibly not be absolutely essential, the practice is so obviously convenient and is sanctioned by usage of so long a period, that it has become invariable. Recitals may, or may not be advisable; they are not an essential part of a deed. After the recitals (if any) follow the words of the *testatum;* and then come the statement of the consideration, the receipt and the operative words. These are followed by the description of the property, usually called the parcels, which will express any exceptions or reser-

Testatum, &c.

(*n*) See the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26. If the conveyance is in exercise of a power requiring attestation, the terms of the power must be observed. Two witnesses will, however, be sufficient to the attestation of any deed, though a greater number be required by the power: see stat. 22 & 23 Vict. c. 35, s. 12.

(*o*) The following would be a perfectly valid form of conveyance of freehold land to any extent:—

[*Vendor*], of, &c., in consideration of £—— now paid to him by [*purchaser*], of, &c., (receipt hereby acknowledged), as beneficial owner, conveys all [*describe parcels*], to hold to and to the use of [*purchaser*], in fee simple.

Dated, &c.

Signed, sealed and delivered in the presence of } [*Signature of Vendor*] (L. S.).

[*Signature of Witnesses*]. [*Signature of Purchaser*] (L. S.).

The description of the parcels might, no doubt, have to be stated at some length.

Modern Purchase Deeds.

vations which may be intended to be made out of the property to be conveyed.

The "premises."

All these portions of a deed are classed together and denominated the "premises": 2 Bl. Com. 298; Shep. Touch. 5; *Hide* v. *Whistler*, 11 Rep. 51; Co. Litt. 6 a. The proper meaning of the word "premises" is "all that has gone before": but this general meaning was, as regards the formal parts of deeds, early specialised and confined to all those parts which precede the *habendum*, or in deeds of appointment or of covenant, and other deeds which contain no *habendum*, to those parts which precede and include the operative part. The popular use of the term, as a general synonym for the property conveyed by the deed, is certainly inaccurate; it is, however, frequently employed by conveyancers to denote the property comprised in the deed, but it is properly so employed only after the parcels have been fully described, and merely as a compendious mode of referring to the property intended to be conveyed with all the appurtenances and appendages specified as intended to pass with the property.

Habendum.

The next portion of the deed is usually the *habendum*, the function of which is to limit the estate of the grantee, and which is immediately followed by the declaration of uses. Formerly the covenants for title were next in order; but the operation of the Conveyancing and Law of Property Act, 1881, whereby statutory covenants for title are implied in purchase deeds by expressing the vendor to convey as "beneficial owner," or "as trustee," &c., as the case may require, is such that express covenants for title are now generally omitted; any special covenants and provisions that may be necessary will be inserted in this place, as also the acknowledgment of right to production and undertaking for safe custody of any deeds retained by the vendor; and the deed will conclude with the *testimonium*, or witnessing clause, which connects the body of the deed with the signatures and seals of the parties.

Covenants.

Construction of deeds.

A deed is framed in such a manner that it forms in effect one continuous sentence, from the first word

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to the last; and this fact should be borne in mind in considering the form in which the clauses composing a deed are constructed.

Indentures.

Deeds which are indentures (*p*) commence with the words "This indenture," and the sentence thus begun continues without a break until the date and parties have been enumerated. Then, if there be any recitals, they are interjected in a series of parenthetical clauses, the first of which begins with the word "whereas." After the mention of the parties, or the close of the recitals, as the case may be, the main sentence is resumed by the words "Now this indenture witnesseth," and, with parentheses containing the statement of the consideration, and the receipt, continues in orderly course to the close of the *habendum;* and any special covenants or provisoes that there may be, are added on to the main sentence in the form of co-ordinate sentences; and the whole finds its completion in the witnessing clause, which is united to the preceding sentences by

(*p*) "Indenture" is a term of art, meaning a deed which is indented. Originally, when a deed was made between two parties, it was usual to make two copies of the deed upon the same roll of parchment, writing some word across the parchment between the two copies. This word was then cut through in a waving or "indented" line; and it was possible to determine whether the deeds were, as they professed to be, copies the one of the other, by the simple process of applying them the one to the other and seeing whether they tallied or not. When there was only one party to a deed, there would, as a matter of course, be no need for more than one copy of it; and the indenting the parchment would not be necessary, so that the parchment would be cut straight, or "polled." Hence arose the distinction of modern times, by which a deed to which there is only one party is called a "deed poll," while a deed to which there is more than one party is called an "indenture."

Formerly it appears to have been considered necessary that a deed which purported to be an indenture should be actually indented; but whatever ground there may have been for that opinion (and it appears not to have been well founded: cf. Co. Litt. 143, b; 229, a; *Frampton* v. *Styles*, Cro. Eliz. 472; 5 Rep. 20; and in Bac. Abr. by Gwill. *Leases* (E) 2) was taken away by the Act for amending the Law of Real Property (8 & 9 Vict. c. 106, s. 5), which provides that a deed executed after the 1st October, 1845, purporting to be an indenture, shall have the effect of an indenture, though not actually indented. It appears, therefore, that a deed which is intended to have the effect of an indenture, should be stated to be an indenture.

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the force of the relative pronoun "whereof." When a deed contains more than one *testatum*, each becomes a separate sentence co-ordinate with the others.

Deeds poll.

Deeds poll are constructed upon the same principle, but where a deed poll contains no recitals, the sentence is commenced with the words "Know all men by these presents that I, A. B., of, &c., do hereby," and flows on without break to its conclusion; while a deed poll in which there are recitals begins with the words "To all to whom these presents shall come [*the grantor*], of, &c., sends greeting." Then follow the parenthetical clauses containing the recitals; and the main sentence being resumed at the words "Now these presents witness," is continued without interruption to its close, in the same way as in an indenture.

Punctuation.

It must be observed that there is no punctuation in a deed. The phraseology of a draft should be so arranged as to render punctuation unnecessary. In the precedents which follow these remarks, stops are inserted as is usual in printed matter; but in a draft they should always be omitted. An exception is made with respect to the marks of parenthesis, though even these would be disregarded if they were inserted so as not to be in agreement with the sense; or the sense may be supplied if from the context it appear necessary: *Doe* d. *Willis* v. *Martin*, 21 T. R. 39; *Owen* v. *Smyth*, 2 H. Bl. 594; *Tunstall* v. *Trappes*, 3 Sim. at p. 312; *Rochfort* v. *Fitzmaurice*, 2 Dr. & W. 1; *Re Denny's Estate*, L. R. 8 Eq. 427.

CHAPTER II.

WHO MAY BE VENDORS AND PURCHASERS.

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1. WHO MAY BE VENDORS.

Who may be Vendors—Generally.

Generally.]—Any person who is absolutely entitled to any property or to any interest in any property, provided that he be under no disability, and that the property or the interest therein be of a saleable description, may become the vendor of such property or interest.

Persons absolutely entitled may sell to extent of their interests.

Similarly, any person who is *sui juris* and not incapacitated from entering into a contract, may become a purchaser. By incapacity must be understood not only absolute incapacity, whether physical or legal to sell or buy, but also incapacity arising out of the relation in which a person stands either to the property intended to be sold or bought, or to the person with whom he intends to deal.

Persons not under incapacity may purchase.

Thus a tenant in fee can sell the whole estate in fee simple, and can, within the limits permitted by the law, burden the land with any restriction (*a*)

Tenants in fee simple.

(*a*) See judgment of Lord *Brougham*, C., in *Keppell* v. *Bailey*,

Who may be Vendors—Generally.

which he may think proper. And the absolute owner of a chattel real or personal may deal with it at his pleasure.

Tenants for life, &c.

A tenant for life or *pur autre vie*, or in dower, or by the curtesy can also sell the estate of which he or she is possessed. But a tenant for life or other owner of a limited estate, whether in land or in chattels, cannot, except in the exercise of a power, either express or statutory, deal with the corpus of the estate. If a limited owner, except in exercise of a power, purports to sell the fee simple, the disposition will be valid only to the extent of the vendor's estate, and will not bind the persons entitled in remainder expectant on the determination of that estate. The same principle will apply if a limited owner conveys land for an estate less than the fee simple; so if a tenant for life conveys land to another for the life of the latter, the grantee will acquire only an estate determinable on the death of such one of the parties, the grantor and grantee, as shall die first. A grant by a tenant for life creates an estate *pur autre vie*, and may be made to the grantee and his heirs, in *quasi* tail, or for life, determinable in any case on the death of the grantor. This question will be more fully considered later in the present volume.

As to estates tail.

The proper mode of creating an estate tail is, as is well-known, to grant the land to the grantee "and the heirs of his body." Formerly such a grant was termed a "conditional gift," as implying a condition that if the grantee should die without issue, or upon subsequent failure of his issue, the land would revert to the donor: 2 Bl. Com. 110. As early, however, as the reign of Henry the Third it was laid down by Bracton that the heir acquires nothing from the gift made to his ancestor: see Bract. lib. 3, cap. 6, fol. 17A. And thus it became a settled rule of law

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2 My. & K. 517, at p. 635. The question as to what burdens and restrictions may legally be imposed upon land is, of course, distinct from the question how far a restrictive covenant can be enforced against assigns: see *Tulk* v. *Moxhay*, 2 Phill. 774; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; and see *post*, pp. 288 *et seq.*

Who may be Vendors—Generally.

that, as a grant to a man and his heirs enabled him to convey the land to another for so long as his heirs should continue to exist, that is, for ever, so also a tenant in tail was immediately upon the birth of issue entitled to convey absolutely the fee simple of the land, and so bar as well his own issue of their remainders, as also the original donor of his right of reverter.

Statute *De Donis Conditionalibus.*

In order to check the disintegration of feudal estates caused by the prevalence of this doctrine, the statute *De Donis Conditionalibus* was passed in the reign of Edward the First (13 Ed. 1, c. 1), whereby it was provided that the will of the donor according to the form of the deed of gift manifestly expressed should thenceforth be observed; and thus a tenant in tail was deprived of his power of alienating the land so as to defeat the claims of his issue (if any) after his death, or of the original donor on failure of such issue.

Effect of conveyance by tenant in tail.

This statute is still in force, so that an unenrolled conveyance by a tenant in tail (except a tenant in tail in possession conveying under his statutory powers) to a grantee and his heirs will not effectually pass to the latter the fee simple of the land nor any other certain estate therein extending beyond the life of the tenant in tail, the grantor. The effect of such a conveyance would seem to be to pass to the purchaser, an estate in fee determinable on the death of the tenant in tail, by the entry of the issue, or of the remainderman or reversioner: see *Sturgis* v. *Morse*, 2 De G. F. & J. at pp. 231, 232. See also *Seymour's Case*, 2 Ld. Raym. 779, 782 (*b*).

(*b*) So if a tenant in tail by exchange give a fee simple, this is good until it be avoided by the issue in tail: 1 Co. Litt. 51, a. But the limitation by a tenant in tail (by a deed not in conformity to the stat. 3 & 4 Will. 4, c. 74) of an estate to commence on his own death is absolutely void; and his estate tail continues as before, his issue having a title paramount *per formam doni:* see *Bedingfield's Case*, 2 Rep. 52, a; *S. C.*, Cro. Eliz. 895; *Machell* v. *Clarke*, 2 Ld. Raym. 779. And the grant of a rent out of an estate which is entailed is absolutely void: *Walter* v. *Bould*, Bulst. 32.

The observations in the text raise a point of some practical importance with regard to the consequences of an omission to enrol within the prescribed period a conveyance by a tenant in tail. The

Who may be Vendors—Generally.

Disentailing assurances.

A tenant in tail may, however, by means of a disentailing assurance duly enrolled under the Fines and Recoveries Act (3 & 4 Will. 4 c. 74), and with the consent of the protector of the settlement (if any) bar the entail and acquire the fee simple of the land, which he may afterwards freely dispose of by way of sale or otherwise in fee simple. This subject will be fully considered in a later part of this volume, in treating of disentailing assurances, sub tit. SETTLEMENTS. Some remarks are, however, here inserted with regard to sales of land by tenants in tail who have not so barred their estates tail, and acquired the fee simple in their lands.

Sale by tenant in tail under the Fines and Recoveries Act.

Tenants in tail in possession of freeholds may generally (*c*) at the present time sell and convey to a purchaser the fee simple of the land by means of a conveyance purporting to pass the fee simple by the appropriate words, provided the conveyance be duly enrolled in the Chancery Division of the High Court of Justice within six calendar months after its execution by the vendor. The enrolment may be made either by the vendor or the purchaser. If so enrolled, the deed will take effect as from the time of its execution, except as against persons having no notice of the voidable estate so created, and claiming for valuable consideration under an instrument which, though executed subsequently, is enrolled previously to the conveyance: see stat. 3 & 4 Will. 4, c. 74, ss. 38, 41, 74; see also *Cattell* v. *Correll*, 4 Y. & C. 228.

A legal tenant in tail of copyholds may dispose of the same so as to bar the entail by surrender; and an equitable tenant in tail may bar the entail

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effect of an unenrolled conveyance being not to create a "base fee" within the meaning of the Act (see sect. 1), but a fee determinable by entry, the statutory provision as to enlargement of base fees would not seem to apply so as to give the purchaser the benefit of any subsequent assurance or event vesting in the tenant in tail the fee simple: see stat. 3 & 4 Will. 4, c. 74, s. 39.

(*c*) The tenants in tail of certain estates conferred on persons by various Acts of Parliament as rewards for public services are restrained from thus alienating such estates, as, for instance, the Dukes of Marlborough and Wellington and the Earl of Abergavenny: see *post*, tit. SETTLEMENTS.

Who may be Vendors—Generally.

either by surrender or by deed. Where such disposition is by deed, the deed by which the disposition is effected must be entered on the Court Rolls of the manor within six months after its execution: see sects. 50 and 53 of the Act; and see *Honywood* v. *Foster*, 30 Beav. 1; *Gibbons* v. *Snape*, 1 De G. J. & S. 621 (*d*).

Consent of protector of settlement.

If there be a protector of the settlement his consent will be necessary to the validity of a conveyance in fee simple by the tenant in tail; otherwise the purchaser will acquire only a base fee, barring the issue in tail, but not those claiming in remainder or reversion: see sect. 1. Such consent may be given either by the same assurance by which the disposition of the tenant in tail is effected, or by a deed distinct from the assurance, to be executed on or before the day on which the assurance is executed: sect. 42. Where the consent is given by a distinct deed, the same will be void unless enrolled with or before the assurance: sect. 46. In the case of copyholds the consent of the protector to bar the estate tail may be given by deed (whether the estate be legal or equitable), or, where the tenant in tail surrenders, by the protector in person to the person taking the surrender. Where the consent is given by deed, the deed must either at or before the time when the surrender is made be executed by the protector and produced to the lord of the manor or his steward or deputy-steward; otherwise the consent will be void. And the lord or steward or deputy-steward is to indorse on the deed of consent an acknowledgment of its production within the prescribed time, and cause the deed, with the indorsement, to be entered on the Court Rolls: see sect. 51 (*e*). Where the protector's consent

(*d*) Sect. 53 applies only to equitable tenants in tail of lands held by copy of Court Roll, and does not apparently extend to customary freeholds: *Reg.* v. *Lord of the Manor of Ingleton*, 8 Dowl. P. C. 693; *Carlisle* v. *Towns*, 2 B. & Ad. 585.

(*e*) It will be prudent for the purchaser to see that the deed of consent is entered on the Court Rolls at or before the time when his conveyance is entered thereon, though the Act contains no express provision on this point.

Who may be Vendors—Generally.

is given personally, evidence of such consent is to be preserved on the Court Rolls, as provided in sect. 52.

Sale by tenant in tail under Settled Land Acts.

A tenant in tail may also convey the fee simple without any necessity for the conveyance being enrolled by exercising the powers of sale conferred on limited owners by the Settled Land Act, 1882, as to which see *post*, p. 40 *et seq.* (*f*).

Sale by co-owners.

Where there are several co-owners, as joint tenants, co-parceners, or tenants in common, the concurrence of all is of course necessary to effect a sale of the entirety of the property; but each co-owner may effectually dispose of his or her interest. It seems that a contract by a joint tenant for the sale of his interest will in equity operate so as to sever the joint tenancy, and destroy the right of survivorship as between the purchaser and the other co-owners, and thus constitute the former a tenant in common of the undivided aliquot share purchased: *Brown* v. *Raindle*, 3 Ves. 256; *Frewen* v. *Relfe*, 2 B. C. C. 220; *Kingsford* v. *Ball*, 2 Giff. Ap. 1. The purchaser of an undivided share of land will succeed to the position of his vendor as regards concurring in, and right to compel a partition: as to which see *ante*, Vol. IV., tit. PARTITION.

Sales under express powers.

Sales under Express Powers in Settlements and Wills.]—It has long been usual in settlements and

(*f*) It may be remarked that if a tenant in tail convey by deed enrolled so as to bar the entail, the deed will operate both on the land, so as effectually to pass the fee simple, and also on the purchase-money, so that the vendor will be entitled to receive the money absolutely for his own benefit, and be able to give an effectual receipt for the same. If, however, the tenant in tail sells and conveys under his statutory powers as a limited owner, the purchase-money must be paid into Court, or to the trustees of the settlement, and upon their receipt; and in either case the money will remain subject to the settlement, so that the vendor must execute a disentailing assurance to entitle him to receive the money for his own benefit.

The powers of the Court to sell settled lands upon the application of limited owners under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), are now seldom put in force: see as to these powers, *post*, p. 38.

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wills to give to the tenant for life, or to the trustees, powers of sale over the settled lands; and such powers are regarded as usual and proper to be inserted in all settlements: *Hill* v. *Hill*, 6 Sim. 136; *Bedford* v. *Abercorn*, 1 My. & Cr. 312; *Turner* v. *Sargent*, 17 Beav. 515; *Wise* v. *Piper*, 13 Ch. D. 848. Such powers are frequently subject to restrictions requiring the consent of the trustees, or of the tenant for life, as the case may be, as a condition of their effectual exercise, and the terms of the power must of course be observed.

Duty of donees of powers of sale.

The donees of such powers are required to exercise reasonable discretion in performing their duty with respect to them, and must be actuated by no improper motive, and if they do not act reasonably they may be held liable for the consequences: *Marshall* v. *Sladden*, 4 De G. & Sm. 468; *Turner* v. *Harvey*, Jac. 178; *Ord* v. *Noel*, 5 Mad. 440; *Pechel* v. *Fowler*, 2 Anst. 550. Trustees for sale are of course bound to sell, so far as their judgment goes, to the best advantage for their *cestui que trust*, but they are only bound *bonâ fide* to exercise an honest discretion: *Harper* v. *Hayes*, 2 Giff. 210; 2 De G. F. & J. 542; *Selby* v. *Bowie*, 4 Giff. 300; *Downes* v. *Grazebrood*, 3 Mer. 209; *Dance* v. *Goldingham*, L. R. 8 Ch. 902; *Dunn* v. *Flood*, 28 Ch. D. 586. And see further as to sales by fiduciary vendors, *ante*, Vol. II., Conditions of Sale, pp. 729 *et seq.*

Exercise of discretionary power not open to question.

Where a power of sale is expressly exercisable in the discretion of trustees, even though for a specified purpose, a purchaser will not be allowed to question the discretion of the trustees as to the propriety of selling: *Lord Rendlesham* v. *Meux*, 14 Sim. 249.

Trust to mortgagee does not authorize sale.

A power or trust to raise money by mortgage will not authorise a sale, nor has the Court jurisdiction in such a case to order a sale, even though shown to be more beneficial to the estate: *Drake* v. *Whitmore*, 5 De G. & S. 619.

Sale of equity of redemption.

Under a trust to sell property which is subject to a mortgage, and out of the proceeds to pay off the mortgage, and pay the surplus to the mortgagor, the trustees may sell subject to the mortgage: *Manser* v. *Dix*, 8 De G. M. & G. 703.

Time within

Trustees for sale are bound to sell with all reason-

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which sale must be made.

able speed; but the Court will not interfere with a *bonâ fide* exercise of their discretion in this respect: *Hawkins* v. *Chappell*, 1 Atk. 623; *Lechmeer* v. *Earl of Carlisle*, 3 P. Wms. 215; *Walker* v. *Shore*, 19 Ves. 391; *Greisley* v. *Lord Chesterfield*, 13 Beav. 294; *Vickers* v. *Scott*, 3 My. & K. 500; *Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232; *Turner* v. *Buck*, L. R. 18 Eq. 301. Nor, when the time is expressly limited by the will creating the trust, will the Court of necessity hold the trustees bound to execute the trust within that time: *Pearce* v. *Gardner*, 10 Ha. 287; and compare *De la Salle* v. *Moorat*, L. R. 11 Eq. 8; *Edmunds* v. *Edmunds*, 34 L. T. N. S. 522. Even where the power is discretionary in point of time, the trustees must not arbitrarily postpone the sale so as to vary the relative rights of the beneficiaries: *Walker* v. *Shore*, 19 Ves. at p. 391; see also *Hawkins* v. *Chappel*, 1 Atk. 623. When the delay has been unreasonable or improper, the trustees will be held responsible for any loss: *Cuff* v. *Hall*, 1 Jur. N. S. 972; *Devaynes* v. *Robinson*, 24 Beav. 86; *Fry* v. *Fry*, 27 Beav. 144; *Stronghill* v. *Anstey*, 1 De G. M. & G. 635.

Power for trustees for sale to sell by auction, &c.

By sect. 35 (1) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), trustees with a power of sale may sell or concur in selling all or any part of the property, together or in lots, by public auction or private contract, subject to such conditions as to title or evidence of title, or other matter, as the trustees may think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell without being answerable for any loss. The power of sale vested in trustees under Lord Cranworth's Act (23 & 24 Vict. c. 145) was not repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), but is now repealed by sect. 64 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

Confirmation of Sales Act.

The common power of sale in settlements was held, in the case of *Buckley* v. *Howell*, 29 Beav. 546, not to authorise the sale of the surface apart from the minerals. An objection taken to such a sale was upheld, on the ground that the tenant for life, being

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not impeachable for waste, would, in the event of the purchase money being laid out in the purchase of other lands containing minerals, be benefited to a greater degree than was just. The judgment in this case was based on the authority of *Cholmondeley* v. *Paxton*, 3 Bing. 207, when it was decided that trustees could not sell the surface and the timber apart from one another. The Confirmation of Sales Act (25 & 26 Vict. c. 108) was accordingly passed, under which trustees with the ordinary power of sale can, with the sanction of the Court obtained in a summary way on petition, effect such sales so far as regards minerals.

Whether "assigns" of trustees can sell.

When an estate is devised to trustees and their heirs upon trust to sell, there being no mention of "assigns," it was held by *Jessel*, M. R., that the trust must be taken to be annexed, not to the person of the trustees, but to the fee simple estate given to them, and that the devisees of trust estates of the surviving trustee could sell and make a good title: *Osborne to Rowlett*, 13 Ch. D. 774, practically overruling *Cooke* v. *Crawford*, 13 Sim. 91. But see *Re Morton and Hallett*, 15 Ch. D. 143, in which *Osborne to Rowlett* was doubted by *James* and *Baggallay*, L.JJ.; so that the question as to whether a devisee of trust estates in such a case can sell is still an open one, so far as regards cases where the surviving trustee's death took place before the 1st of January, 1882. But by sect. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted, as regards cases of death after the commencement of that Act, as follows:—

Devolution of trust and mortgage estates on death.

(1.) "Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative

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from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2.) "Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3.) "This section, including the repeals therein, applies only in cases of death after the commencement of this Act."

Effect of this section (*g*).

The effect of this section is that as regards a sole trustee dying after the 31st of December, 1881, where there is a trust estate vested in the trustee, his heirs and assigns, or heirs simply, the trust estate vests in his personal representative, though consisting of freeholds or copyholds (see *Re Hughes*, W. N. 1884, p. 53), as if it had consisted of a term of years. In a recent Irish case it was held, that where an estate was devised to trustees, upon trust that they or the survivor of them should sell, the heirs not being mentioned, the executors of the surviving trustee could not make out a good title to a purchaser, notwithstanding this section: *Re Ingleby, &c., Insurance Co.*, 13 L. R., Ir. 326. It would seem that in any case a devise of trust estates is now rendered unnecessary and inoperative, and that the decisions as to whether devisees of trust estates can exercise the trust, have no longer any application, except as regards deaths before the commencement of the Act. See also, as to the effect of this section, *Re Pilling*, 26 Ch. D. 432.

This section will apply where there is a contract for the sale of land and the vendor has died pending completion, the title having been accepted by the purchaser, or made out according to the contract; the vendor is then a trustee for the purchaser: *Lysaght* v. *Edwards*, 2 Ch. D. 506; and his personal representative will be the proper person to convey.

(*g*) The operation of this enactment, as regards the devolution of mortgage estates, has been already discussed: see *ante*, tit. MORTGAGES, Vol. III., pp. 922 *et seq.* and pp. 963 *et seq.*

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In connection with sect. 30 must be read sect. 4 of the same Act, which enacts that :—

Completion of contract after death.

(1.) "Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) "A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) "This section applies only in cases of death after the commencement of this Act."

Sales by executors.

Of the same nature as sales by trustees are sales by executors and others under common law powers in wills, or under a power with an interest attached. It seems that a devise to the executors in trust to sell will vest the estate in them ; but that a devise that the executors shall sell, or that the lands shall be sold by the executors, will give them only a common law power : see Sug. Pow. 111, 115 ; Co. Litt. 113 a ; *Doe* v. *Shotter*, 8 A. & E. 905 ; *R.* v. *Wilson*, 9 Jur. (N. S.) 439. And executors can also sell when there is a charge of debts on real estates, and in such cases they have power to give a discharge for the purchase-money : *Forbes* v. *Peacock*, 1 Phill. 717 ; *Elliott* v. *Merryman*, 2 Atk. 4 ; *S. C.*, 1 Wh. & Tud. L. C. 51 ; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635 ; *Robinson* v. *Lowater*, 5 De G. M. & G. 272 ; see Williams on Executors, ch. xiii., s. 3. It appears, however, that this power is merely equitable, and that (independently of Lord St. Leonards' Act, *infra*) executors selling under an implied power arising from a charge of debts, cannot pass the legal estate : *Doe* d. *Jones* v. *Hughes*, 6 Exch. 223 ; *Kenrick* v. *Lord Beauclerck*, 3 B. & P. 175 ; *Eidsforth* v. *Armstead*, 2 K. & J. 334 ; *Wrigley* v. *Sykes*, 21 Beav. 337 ; *Shaw* v. *Borrer*, 1 Keen, 576 ; *Gosling* v. *Carter*, 1 Coll. 644 ; and it seems that the executors can compel the persons in whom the legal estate is vested to concur for the purpose of passing it : *Hodkinson* v. *Quinn*, 1 J. & H. 303.

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Sales by devisees in trust.

It frequently happens that land is charged with the payment of debts, and devised to trustees. When this is the case, the trustees are the proper persons to sell, and also to receive and apply the purchase-money: see *Shaw* v. *Borrer*, 1 Keen, 559; *Stroughill* v. *Anstey*, 1 De G. M. & G. 647; *Sabin* v. *Heape*, 27 Beav. 553; *Colyer* v. *Finch*, 5 H. L. C. 905; *Hodkinson* v. *Quinn*, 1 J. & H. 310. A purchaser from devisees in trust is protected from the necessity of seeing to the application of his purchase-money, whether the trust was created before or after the commencement of the Conveyancing and Law of Property Act, 1881: see sect. 36 of that Act. The effect of a charge of debts is permanent, since it has been repeatedly held that the fact that a considerable period of time has passed since the testator's death, does not affect the power to sell: *Forbes* v. *Peacock*, 1 Phill. 717; *Wrigley* v. *Sykes*, 21 Beav. 337; *Sabin* v. *Heape*, 27 Beav. 553; *Greetham* v. *Colton*, 34 Beav. 615; *Re Tanqueray-Willaume & Landau*, 20 Ch. D. 465 (*i*).

Lord St. Leonards' Act, 22 & 23 Vict. c. 35, ss. 14, 15, and 16 (*h*).

In addition to this implied power to sell under a charge of debts, it is enacted, in substance, by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 14), that where there is a charge of debts, or of a legacy, or any specific sum of money, on real estate, and the estate so charged is devised to a trustee or trustees for the whole of the testator's estate or interest therein, and there is no express provision made for raising the charge, the trustee or trustees may, notwithstanding any express trusts, sell the estate so charged. Such powers are by sect. 15 extended to those in whom the estate vests by survivorship, descent, or devise, or to any successor in the trusteeship. By sect. 16, the same powers are given to executors, where there is no devise in trust such as that required by sect. 14. And sect. 23 enacting

(*h*) See these sections set out in full, *ante*, sub tit. MORTGAGES, Vol. III., p. 716.

(*i*) In *Re Tanqueray-Willaume & Landau*, at p. 480, *Jessel*, M. R., laid down a rule that a purchaser of realty from executors in whom the legal estate is vested is not bound or entitled to inquire whether debts remain unpaid unless *twenty* years have elapsed since the testator's death. This rule does not apply to a sale of personalty by an executor: see *Re Whistler*, W. N. 1887, p. 120.

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that a sale under the Act "shall operate only on the estate and interest *whether legal or equitable* of the testator, and shall not render it unnecessary to get in any *outstanding legal estate*," seems impliedly to empower executors to pass the legal estate in realty sold by them under this Act: see Lewin on Trusts, p. 267. The power of sale does not extend to an administrator: *Re Clay and Tetley*, 16 Ch. D. 3.

Consent of tenant for life.

According to the former practice in framing settlements and wills, the consent of the tenant for life in possession was usually required for the exercise by the trustees of a power of sale of the settled lands, and now such consent is by statutory enactment rendered generally necessary, except where there is a trust for sale, or where the power of sale is imperative and not discretionary: see *post*, p. 54.

Purchase by tenant for life from trustees.

A tenant for life who has a power to consent to a sale or to a purchase, is entitled to deal with the trustees of the settlement under which he is tenant for life, provided he deals fairly and openly with them. Thus he can purchase from the trustees the settled property, or take it in exchange: *Howard* v. *Du Cane*, 1 T. & R. 81; *Beavan* v. *Habgood*, 1 J. & H. 222; and it would probably be held that he was entitled to sell his own property to the trustees. It is, however, incumbent on him to make full disclosure to them of any thing affecting the value of the property about to be dealt with: *Dicconson* v. *Talbot*, L. R. 6 Ch. 32.

The practice of inserting express powers of sale in settlements and wills is, generally speaking, rendered obsolete by the statutory enactments presently to be considered, giving to limited owners in possession powers of sale over the settled lands.

Statutory powers of sale of settled lands.

Sales under Statutory Powers.]—The powers of limited owners, and other owners incapacitated from dealing with their property, have from time to time been largely increased by Acts of Parliament. The operation of these Acts has either been directed to a general enlargement of these powers, with the view of enabling such persons to dispose of their land for any purpose for which such disposition may be de-

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sirable, or it has been confined to enabling alienations for special objects and under particular conditions. To the first class belong the Acts dealing with the property of infants, married women, and lunatics, and conferring on tenants for life and other limited owners powers to sell settled estates; to the latter the Acts enabling sales to be made by such persons to municipal and other corporations, or to public companies, or for purposes of charity and other public objects.

Settled Estates Act, 1877.

Under the Leases and Sales of Settled Estates Act (40 & 41 Vict. c. 18), the Court had power (sect. 16) to authorise sales of settled estates or the timber (not being ornamental timber) growing thereon; and on such sales (sect. 19) the minerals and any necessary powers for working them may be reserved. And under this Act it has been held that minerals can be sold separately from the surface, and compensation, by way of rent-charge, reserved in respect of damage done to the surface: *Re Law*, 7 Jur. (N. S.) 511; *Re Mallins*, 3 Giff. 125; *Re Milward's Estate*, L. R. 6 Eq. 248; and part of the surface may be included in a lease of minerals: *Re Revely*, 11 W. R. 744. The Court is also empowered (sects. 20, 21, and 22) to direct the laying out of part of the settled estate for streets, roads, paths, squares, gardens, and sewers, either to be dedicated to the public or not; and also to direct the carrying out of the works necessary, and the execution of the deed of conveyance; and such conveyance is to operate as if the settlement had contained a power for the person or persons by whom it is executed, to effect such sale or dedication. As to the conditions under which the Court would exercise their powers, see *Re Hurle's Settled Estates*, 2 H. & M. 196; *Re Chamber's Settled Estates*, 28 Beav. 633; *Re Thompson*, Johns. 418; *Re Morgan*, L. R. 9 Eq. 587; *Eyre* v. *Sanders*, 7 W. R. 366. These sections do not empower the Court to direct the carrying out of drainage for agricultural purposes. The powers given by them have reference exclusively to the development of land for building purposes: *Poynder* v. *Cook*, 50 L. J., Ch. 753. With regard to the mode of con-

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veyance, see *Re Eyre*, 4 K. & J. 268; *Re Hale*, W. N. 1868, p. 70.

It is, however, necessary, under this Act (sect. 23), that the Court should be put in motion, by petition in a summary way, by some person entitled to the possession, or to the receipt of the rents and profits for a term of years determinable on his death, or for an estate for life (*j*), or some greater estate, or the assignee of such person.

By sect. 24, with the exception hereafter mentioned, the application to the Court must be made with the concurrence or consent of the person entitled under the settlement to the first estate in tail if of full age, and of every person having under the settlement any beneficial estate or interest prior to such estate tail, and also all trustees having any estate or interest on behalf of any unborn child prior to such estate tail; and if there be no such tenant in tail, then with the concurrence or consent of all persons in existence having any beneficial estate or interest (*k*) under the settlement, and also all trustees having any estate or interest on behalf of any unborn child. When an infant is tenant in tail under the settlement, the Court has power under sect. 25 to dispense with the consent of persons entitled to estates or interests subsequent to the estate tail of

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(*j*) Including an estate *durante viduitate*, *Williams* v. *Williams*, 9 W. R. 888. See also as to who can petition: *Grey* v. *Jenkins*, 26 Beav. 351; *Re Potts*, L. R. 16 Eq. 631, n.; *Re Boughton*, 12 W. R. 34; *Re Hutchinson*, 14 W. R. 473; *Re Merry's Estate*, 15 W. R. 307; *Re Turbutt's Estate*, 2 W. R. 158; *Re Legge's Settled Estates*, 4 W. R. 20; *Re de Tabley's Settled Estates*, 11 W. R. 936; *Re Williams*, 20 W. R. 967; *Re Parry's Will*, 34 Beav. 462; *Re Wilkinson*, L. R. 9 Eq. 71; *Taylor* v. *Taylor*, 1 Ch. D. 430, 3 Ch. D. 145.

(*k*) See *Re Ives*, 3 Ch. D. 690, where the property was to be sold on the death of the tenant for life and divided amongst a number of persons absolutely; it was held that the concurrence of all the beneficiaries was necessary. The persons whose consent is required are persons whose consent can be obtained; where the remainderman was unascertained his concurrence was dispensed with: *Beioley* v. *Carter*, L. R. 4 Ch. 230; *Re Strutt*, L. R. 16 Eq. 629. See also *Re Marquis of Cholmondeley*, W. N. 1866, p. 388; *Re Pott*, L. R. 16 Eq. 631 n.; *Re Spurway*, 10 Ch. D. 230. And as to the inability of trustees to concur on behalf of a child in existence, see *Re Ives*, 3 Ch. D. 690; and *Re Dendy*, 4 Ch. D. 879.

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such infant; and where the concurrence or consent of any person whose concurrence or consent is required by the Act has not been obtained, notice (sect. 26) is to be given to such person, requiring him to notify within a definite time whether he assents to or dissents from the application, or whether he submits his rights and interests to be dealt with by the Court; and if he fail to give such notification he is to be deemed to have submitted his rights and interests to be dealt with by the Court. By sect. 27 (*l*), the Court may dispense with notice under certain circumstances; and by sect. 28 the Court may make an order, although the concurrence or consent of any person whose concurrence or consent is required shall not have been obtained or shall have been refused; but the Court, in arriving at a decision, is to have regard to the number of consents and dissents, and to the estates or interests of the consenting or dissenting parties respectively. Moreover, by sect. 29, the Court may give effect to any petition, saving the rights of non-consenting parties.

This Act was framed on the lines of the settlements commonly made of real estate, and aimed at supplementing the powers of the trustees of the settlement, the Court being placed in the position usually occupied by them, with larger powers. But the machinery proved somewhat cumbrous and inconvenient in practice, and the legislature accordingly passed the Settled Land Act, 1882, which proceeds upon the principle of giving to the tenant for life, or other person who is for the time being beneficially in possession of the estate, as large powers of dealing with the estate as could be exercised by an absolute owner, at the same time taking precautions to secure for those beneficially interested in succession the enjoyment of that which shall represent the settled property in its converted state.

Settled Land Acts, 1882 and 1884.

Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the tenant for life is empowered at his own discretion to sell the settled property, with the

(*l*) See *Re Chamberlain*, 23 W. R. 852; *Re Lewis*, 24 W. R. 103; *Re Rylar*, 24 W. R. 949.

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exception of the principal mansion-house and demesnes and heirlooms, and can bind his successors by his contract, without any reference to the trustees beyond a notice to them of his intention to sell. His power of disposition is therefore, with the exceptions referred to, practically unlimited. The purchase-money may at the option of the tenant for life be paid to the trustees of the settlement or into Court, and is to be invested in manner prescribed by the Act; the money and the investments representing the same are to be considered as land, and to devolve and go to the persons and for the estates and interests as the land sold would have gone under the settlement.

Exceptions out of the operation of the Act.

The only estates which are allowed to remain outside the operation of the Act are those (sect. 58 (i.)) which have been purchased with money provided by parliament in consideration of public services, lands belonging to charities, and lands belonging to ecclesiastical and other corporations. As regards the first class, it is to be noted that the Act excludes from its operation only such estates as have been purchased by parliament in reward for public services, such as those attached to the Dukedoms of Marlborough and Wellington, and the Earldom of Nelson (*m*). All other lands in which there exist estates tail, including expressly those granted by the Crown, which, under 33 & 34 Hen. 8, c. 20, were not barrable against the Crown or even as against the issue in tail (see *Ex parte the Earl of Abergavenny*, 19 Beav. 153, a case under the Lands Clauses Consolidation Acts), are now capable of being dealt with by the tenant for life or tenant in tail to all intents and purposes as freely as if they were the property of an owner in fee.

The enactments of the Settled Land Acts, which deal with sales by limited owners, are here set out and considered in detail.

(*m*) Compare the case of the *Earl of Abergavenny* v. *Brace*, L. R. 7 Ex. 145, and *Davis* v. *Duke of Marlborough*, 1 Swanst. 74; and the Acts 2 & 3 Ph. & M. c. 23; 5 Anne, c. 3; and 41 Geo. 3, c. 59; 42 Geo. 3, c. 113; and 54 Geo. 3, c. 161.

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By sect. 3 of the Settled Land Act, 1882, it is enacted as follows:—

Powers to tenant for life to sell, &c.

"A tenant for life (*n*)—

"(i.) May sell the settled (*o*) land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same; and

"(ii.) Where the settlement (*p*) comprises a manor, may sell the seignory (*q*) of any freehold land within the manor, or

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(*n*) By sect. 2 (5) of this Act the term "tenant for life" is thus defined: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for the purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." This definition of "tenant for life" is considered in a former volume of this work: see *ante*, Vol. III., sub tit. LEASES, pp. 29, n., 30, n. See also sub tit. SETTLEMENTS. Recent decisions as to who are tenants for life within the meaning of the Act, or who are entitled to the powers of a tenant for life, under sect. 58, will be found in the cases of *Re Morgan*, 24 Ch. D. 114; *Re Jones*, 24 Ch. D. 583; 26 Ch. D. 736; *Re Hazle's Settled Estates*, 26 Ch. D. 428, 29 Ch. D. 78; *Re Clitheroe Estate*, 28 Ch. D. 378; 31 Ch. D. 135; *Re Paget's Settled Estates*, 30 Ch. D. 161; *Re Atkinson, Atkinson* v. *Bruce*, 30 Ch. D. 605, 31 Ch. D. 577; *Re Hall and Clark*, W. N. 1886, p. 65; *Re Strangways*, 34 Ch. D. 423; and see also sect. 8 of the Settled Land Act, 1884, which enacts that for the purposes of the Act the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

(*o*) For the definition of "settled land," see *ante*, Vol. III., p. 29, n.

(*p*) The definition of "settlement" will be found at p. 29, n., of Vol. III.; and see *Re Knowles' Settled Estates*, 27 Ch. D. 707.

(*q*) In ancient times the most usual form of alienation of land was by subinfeudation. Where an owner in fee, holding either direct from the Crown or under a mesne lord, wished to part with a portion of his property, he would convey it to the grantee and his heirs, to hold of himself and his heirs (*tenendum de me et heredibus meis, sibi et heredibus suis*), reserving certain rents, services, and benefits, the right to which constituted a lordship or seignory. The principal services usually reserved by ancient deeds of grant were homage and fealty (of which the former was abolished by 12 Chas. 2, c. 24, and the latter has become obsolete), and suit of court, or the duty of the tenant to attend at the Court holden by his lord. Grants are not uncommon in Ireland, whereby the fee is parted with in consideration of the reservation of a fee farm or other rent, and also of other seignorial rights and benefits, *e.g.*, sporting, timber, minerals, seaweed, &c. A "manor" is constituted by the union of the lordship or seignory over the freeholds granted out (*terræ tenementales*) and copyholds, with the possession of the demesne lands (*terræ dominicales*) reserved by the lord for his own use and occupation: Co. Lit. 58 a; 2 Bl. Com. 53. See further

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the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes (*r*), so as in every such case to effect an enfranchisement (*s*)."

The tenant for life cannot sell unless there are in existence trustees of the settlement within the meaning of the Act, because he must give notice to trustees of the settlement under sect. 45. Where there were no such trustees, the tenant for life was restrained from selling until they were appointed: *Wheelwright* v. *Walker*, 23 Ch. D. 752. See as to notice, *post*, p. 53.

Regulations respecting sale (*t*).

Sect. 4. "(1.) Every sale shall be made at the best price (*u*) that can be reasonably obtained (*x*).

"(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

"(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

"(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

"(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other uses of

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as to the nature and incidents of manors and seignories, Cru. Dig. i., pp. 19—34; Burton's Compendium, ch. vi., p. 319.

(*r*) As to "mining purposes" and their definitions, see *ante*, Vol. III., p. 29, n. The powers usual in settlements will not authorise a sale of minerals apart from the surface: see *Buckley* v. *Howell*, 29 Beav. 546.

(*s*) The remainder of this section relates to exchanges and partitions.

(*t*) The sub-sections of this section, other than those here set out, relate exclusively to enfranchisement, exchange, and partition.

(*u*) Thus, when a tenant for life proposed to sell at a less price than the remainderman was willing to give, he was restrained: *Wheelwright* v. *Walker*, 31 W. R. 912; W. N. 1883, p. 154. But a tenant for life will not be restrained from selling settled lands on merely speculative evidence adduced by the remainderman of an expected future increase in the value of the property: *Thomas* v. *Williams*, 24 Ch. D. 558. The tenant for life is, by sect. 53 of the Act, a trustee for all parties, and must, in exercising his statutory powers, fulfil his obligations in that character.

(*x*) The omitted sub-sections relate exclusively to exchanges, partitions, and enfranchisements.

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land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party, and any land sold or given in exchange or on partition to him."

Transfer of incumbrances on land sold.

Sect. 5 (*y*). "Where on a sale, exchange, or partition, there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly."

Restriction as to mansion-house, park (*z*), &c.

Sect. 15. "Notwithstanding anything in this Act, the principal mansion-house (*a*) on any settled land, and the demesnes (*b*) thereof, and other lands usually occupied

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(*y*) For a precedent of a deed by a tenant for life under the authority of this section, see *ante*, Vol. III., tit. MORTGAGES, p. 1039 and note.

(*z*) The term "park" appears only in this marginal note, and in the heading to this section. In the case of *Re Venour's Settled Estates*, 2 Ch. D. 525, occurs a dictum of Sir *G. Jessel*, M.R., to the effect that marginal notes are part of Acts of Parliament; but in the later case of *Att.-Gen.* v. *Great Eastern Rail. Co.*, 11 Ch. D. 465, some remarks tending in an opposite direction were made by *Bramwell* and *James*, L.JJ.; and in *Sutton* v. *Sutton*, 22 Ch. D. 511, it was expressly decided that the marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act; and the dictum in *Re Venour's Settled Estates* was corrected. It follows that in this instance the word "park" cannot be read into this section; and that the restriction upon the powers of the tenant for life contained in the section applies strictly to the mansion-house and the demesnes, and other lands usually occupied therewith: see *ante*, Vol. I., p. 415, n.

(*a*) "Mansion-house" is, according to Wharton's Law Lex., merely the equivalent of a dwelling-house.

(*b*) "Demesnes" technically are those parts of the lands of a manor which a lord has not granted to other persons, as his tenants, but which he has reserved for his own use and occupation: Wharton's Law Lex.; *Att.-Gen.* v. *Parsons*, 2 Cr. & J. 279; Co. Cop. s. 14. Here the terms would seem to include all that is usually meant by "park" and pleasure grounds: see *ante*, Vol. I., p. 415, n.

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therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement or an order of the Court."

Sale of mansion-house, &c.

In the case of *Re Brown's Will*, 27 Ch. D. 179, the Court held that the facts that the tenant for life was unable, owing to ill-health, to reside in the mansion-house, and that, inasmuch as the estate was in proximity to a large town, the bulk of the estate could not be sold advantageously without the mansion-house and the adjoining lands, were sufficient to warrant the Court in granting an order for the sale of the mansion-house and adjoining lands, under sect. 15 of the Act. Having regard to the restriction imposed by sect. 15 it would not seem to be safe for a purchaser of any settled land on which there is a residence of any description, and which does not form part of a larger estate, on the unsold part whereof there is a residence which is unquestionably the "principal mansion-house," to take a conveyance from the tenant for life alone, without requiring the consent of the trustees, or an order of the Court. In the case of *Re Hazle's Settled Estates*, 26 Ch. D. 428 (affirmed on appeal, 29 Ch. D. 78), one of the questions submitted to the Court was whether it was proper that the trustees of a will should assent to the grant of a lease of a public-house by a beneficiary; but the point whether such assent was necessary was not considered, it being held that the beneficiary was not a "tenant for life" within the meaning of the Act.

Heirlooms.

A restriction, similar to that placed by sect. 15 on the sale of the mansion-house and demesnes, is by sect. 37 attached to heirlooms. That section enacts that—

"(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

"(2.) The money arising by the sale shall be capital money

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arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

"(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court."

Sale of heirlooms.

When chattels are settled (*c*), either by deed or will, upon trusts corresponding to, or by reference to trusts of settled realty, they are termed heirlooms. The question as to when heirlooms vest absolutely in any of the persons entitled under the settlement is often one of difficulty. But in all cases the intention is to render the chattels for a longer or shorter period inalienable. Under sect. 37, heirlooms can now, under prescribed restrictions, be sold. In the case of *Fane* v. *Fane*, 2 Ch. D. 711, it was held that the Court had jurisdiction to order a sale of heirlooms apart from the settled land, for the purpose of paying off mortgages; and that even though infants were interested the Court would, upon the instance of the tenant for life, and upon being satisfied that it would be for the benefit of all parties interested, order a sale to be made. In *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635, it was held that something more than the mere benefit to be derived by the parties entitled would be necessary to give the Court jurisdiction to

(*c*) The following cases may be referred to upon the subject of heirlooms and the construction of trusts of chattels to correspond with limitations of real estate: *Scarsdale* v. *Curzon*, 2 J. & H. 40; *Stratford* v. *Powell*, 1 B. & B. 1; *Foley* v. *Burnell*, 1 Br. C. C. 284; *Vaughan* v. *Burslem*, 3 Bro. C. C. 106; *Doncaster* v. *Doncaster*, 3 K. & J. 26; *Re Johnson's Trusts*, L. R. 2 Eq. 716; *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382; *Christie* v. *Gosling*, L. R. 1 H. L. 279; *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543; *Harrington* v. *Harrington*, L. R. 5 H. L. 87; *Martelli* v. *Holloway*, L. R. 5 H. L. 532; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302; *Re Viscount Exmouth*, *Exmouth* v. *Praed*, 23 Ch. D. 158; *Re Cresswell*, *Parkin* v. *Cresswell*, 24 Ch. D. 102; *Re Johnston*, *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538; *Re Marquis of Bute*, *Bute* v. *Ryder*, 27 Ch. D. 196.

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sell. Under the Settled Land Act, 1882, the Court has already ordered sales of heirlooms in the following cases: *Re Brown's Will*, 27 Ch. D. 179; *Re Houghton Estate*, 30 Ch. D. 102; *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136; *Re Duke of Marlborough's Settlement, Duke of Marlborough* v. *Marjoribanks*, 32 Ch. D. 1.

The Court, in one case, declined to make an order consenting to the sale of a mansion-house under sect. 15, unless at the same time some direction was made as to the disposal of the heirlooms. The summons in the case was then amended, and the Court made an order for the sale of the mansion-house and also of the heirlooms, leave being given to the tenant for life to bid at the sale of the heirlooms: *Re Brown's Will*, 27 Ch. D. 179.

In the same case it was held that the trustees who were before the Court, sufficiently represented the interests of the children of the tenant for life, to whom the settlement limited equitable remainders in strict settlement upon the life estate. And in the case of *Re Duke of Marlborough's Settlement, Duke of Marlborough* v. *Marjoribanks*, 32 Ch. D. 1, it was held that when heirlooms are sold by the tenant for life with the sanction of the Court, and the proceeds applied in the discharge of incumbrances affecting the inheritance of the settled land, there was no necessity to keep such incumbrances on foot for the benefit of the infant remainderman, in whom the heirlooms would, if unsold, vest absolutely on his attaining the age of twenty-one.

Dedication for streets, open spaces.

By sect. 16 (*d*) of the Act it is provided that a tenant for life may, upon making a sale or grant for building purposes, dedicate or cause to be dedicated to public use or to the use of residents on the estate, streets, roads, squares, gardens, &c.; and may carry out such dedication by vesting the land dedicated in trustees, or in a company or in a public body, or

(*d*) See this section set out in full, *ante*, sub tit. LEASES, Vol. III., p. 37.

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by executing and (if necessary) enrolling (*e*) a deed declaring the mode, terms, and conditions of the appropriation, the manner of enjoyment, and the nature and extent of the privileges and conveniences granted. Prior to this Act a dedication by a leaseholder or tenant for life would have had no validity as against his reversioner or successor in title: *Wood* v. *Veal*, 5 B. & Al. 454; *Harper* v. *Charlesworth*, 4 B. & C. 591.

Separate dealings with surface and minerals, with or without way-leaves, &c.

Sect. 17 (set out *ante*, Vol. III. p. 38) provides that upon a sale of land, the mines and minerals, or any part thereof may be excepted or reserved; and, conversely, the mines and minerals or any part thereof may be sold separately from the surface. In either case any powers of working, any way-leaves or rights of way, water and drainage, and any other powers, easements, rights and privileges which may be desirable for the proper working of mines may be granted or reserved as the case may be; and any powers, easements or rights so granted or reserved, may be so granted or reserved over the settled land or any part thereof or any other land. Formerly there was a difficulty in granting easements under settlements, as they could not be limited by way of use; and it was essential to the existence of an easement that it should be connected with a dominant tenement: *Rangeley* v. *Midland Rail. Co.*, L. R. 3 Ch. 306. Easements may, however, now be created by a grant to uses: see sect. 62 of the Conveyancing and Law of Property Act, 1881. As to the powers of trustees with the usual powers of sale to sell land

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Enrolment of conveyances of land for public purposes.

(*e*) A conveyance of land to trustees for a public purpose is of the nature of a charitable conveyance, and will be required to be enrolled pursuant to the stat. 9 Geo. 2, c. 36; see Jarm. Wills, 208. But a conveyance to a local authority empowered by statute to take land will not require enrolment. A simple dedication to the public differs from a conveyance in that in the former case the freehold in the soil remains in the landowner: *Re Pratt*, 24 L. J. M. C. 113. A dedication will, therefore, not require enrolment, as it operates merely as evidence of the transaction: see Wolstenholme and Turner, Settled Land Acts, 2nd ed., p. 30.

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and minerals apart: see the Confirmation of Sales Act (25 & 26 Vict. c. 108), and *ante*, p. 32.

By sect. 19 the tenant for life of an undivided share may concur with any other person in exercising the powers given by the Act. The section is as follows:—

Concurrence in exercise of powers as to undivided shares.

Sect. 19. "Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share."

Conveyance by tenant for life to a purchaser.

By sect. 20 provision is made for enabling the tenant for life to complete the sale of land, or of easements, or other dealing with the settled property by conveying or creating the same "by deed for the estate or interest the subject of the settlement, or for any less estate or interest to the uses and in the manner requisite for giving effect to the sale" or other dealing (*f*). The conveyance by the tenant for life, even though his estate be merely equitable, will pass to the purchaser the legal estate (unless outstanding in mortgagees or otherwise independently of the settlement) in the lands sold; and the concurrence of the trustees or of any other persons interested under the settlement will in no case be necessary to give effect to the conveyance (*g*). This power of the tenant for life is paramount to all the limitations, powers and provisions of the settlement; and consequently his conveyance will (like a revocation of uses and re-appointment under an express power of sale in a settlement) override any attempted sale of the land by the remainderman, who can give to the

(*f*) See this section set out in full, *ante*, Vol. III., p. 38.

(*g*) Where the sale comprises a mansion-house and demesnes, the consent is necessary unless an order of Court is obtained: see *ante*, p. 44; and such consent will be most conveniently testified by making the trustees parties for the purpose of so doing. And it is the practice generally to make the trustees parties for the purpose of acknowledging the receipt of the purchase-money, except where the money is paid into Court.

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purchaser from him no higher right than he possesses himself, *i.e.* a right, subject to the tenant for life's interest, to the "capital moneys arising under the Act" representing the proceeds of the sale; and this rule holds good even when the remainderman has sold before the passing of the Act: *Wheelwright* v. *Walker*, 23 Ch. D. 752. The conveyance does not, however, operate merely as a revocation of uses and re-appointment, but passes the common law estate in freeholds and leaseholds, and the right of admittance to copyholds.

Copyholds and customary freeholds.

With regard to copyholds or customary land it is provided that it shall be sufficient for the deed of conveyance to be entered on the Court Rolls, and the purchaser, on payment of the customary fines, fees, and other dues and payments, shall be admitted accordingly. The rule hitherto has been that copyholds are vested in a purchaser by the surrender of the vendor, generally made pursuant to a covenant for surrender contained in the deed of sale (see *Noel* v. *Weston*, 6 Madd. 50), and that it is this surrender which entitles the purchaser to complete his title by admittance. But the effect of this provision seems to be to dispense with the necessity of a surrender in the case of a sale of, or other dealing with, settled copyholds under this Act.

Appointment of trustees.

It is to be observed that the trustees of a settlement or will may not necessarily be the "trustees of the settlement" within the meaning of the Settled Land Act, 1882. The definition of trustees of the settlement for the purposes of the Act runs as follows:—

> Sect. 2. "(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees for the settlement."

It will be noticed that trustees in the ordinary sense are "trustees of the settlement" within the

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meaning of the Act only when they have powers of sale or of consent or approval of a sale of the settled land, or if they be declared by the settlement under which they hold to be trustees for the purposes of the Act. Trustees with power of sale with the consent of another are within the definition: *Constable* v. *Constable*, 32 Ch. D. 233; but the power of sale must be a presently existing power, not a power to arise at a future time: *Wheelwright* v. *Walker*, 23 Ch. D. 752. Whether the power of sale must, in order to bring the trustees within the definition, be a power of sale of the "settled land proposed to be sold" seems somewhat doubtful. It has been held by *Bacon*, V.-C., in chambers that this is the true interpretation (*h*); but in *Constable* v. *Constable*, 32 Ch. D. 233, it was held that although the settlement did not authorise the sale of heirlooms, the trustees with power of sale under the settlement, were trustees of the settlement for the purposes of sect. 37 of the Act: and see *Re Duke of Newcastle's Settled Estates*, 24 Ch. D. 129. Where the trustees of a settlement or will do not come within this definition, or wherever (unless otherwise directed by the settlement) there are fewer than two trustees, trustees for the purposes of the Act must be appointed. Whenever it is thus necessary or it has become expedient for the purposes of the Act that new trustees of the settlement should be appointed, the Court may (by sect. 38 (1)) appoint fit persons to be trustees under the settlement for the purposes of the Act. The tenant for life or any person interested in the settled land under the settlement may apply to have the appointment made; or in the case of an infant, the application may be made by his testamentary or other guardian, or by his next friend.

Trustees' receipts.

Capital money arising under the Act (sect. 39) must not be paid to fewer than two persons as trustees of a settlement unless the settlement authorises the receipt of capital trust money under

(*h*) See Settled Land Acts, 2nd ed., Wolstenholme and Turner, p. 14.

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the settlement by one trustee. As to what is a sufficient authorisation within this section see *Re Garnett-Orme and Hargreaves' Contract*, 25 Ch. D. 595. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representative of the last surviving or continuing trustee, is to be an effectual discharge to the payer (sect. 40).

In *Re Harrop's Trusts*, 24 Ch. D. 717, the Court appointed new trustees where, under a will, the trustees had no power of sale. See also *Re Wright's Trusts*, 24 Ch. D. 662. But in *Re Garnett-Orme and Hargreaves' Contract, supra*, the Court held that no appointment by the Court was necessary, as the trustee under one settlement had an express power of sale, and under the other settlement an implied power of sale. It may be argued from this case that trustees who have a power of sale implied from a charge of debts under Lord St. Leonards' Act (see *ante*, p. 36), would be trustees within the meaning of the Act.

With regard to the persons whom the Court will appoint to be trustees of the settlement, it must be remembered that the trustees are to be appointed for the protection of the remainderman. The tenant for life himself is therefore not a fit person to be appointed: *Re Harrop's Trusts*, 24 Ch. D. 717; nor is his solicitor a fit person, because his professional position renders him unsuitable for an office the duties of which require him to check the proceedings of the tenant for life: *Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Kemp's Settled Estate*, 24 Ch. D. 485 (*i*).

Nor will the Court, in general, appoint as trustees of a settlement for the purposes of the Act, two persons who are near relations to each other. There ought to be two independent trustees: *Re Knowles' Settled Estate*, 27 Ch. D. 707. See

(*i*) In *Re Kemp*, the solicitor was actually a trustee originally appointed by the testator, but without the power of sale necessary to constitute him a "trustee of the settlement" within the meaning of the Act.

further as to the appointment of trustees, *ante*, Vol. II. pp. 1 *et seq.*

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Notice to trustees.

By section 45 (*k*) a tenant for life who intends to sell or deal with the settled estate must give notice of his intention to the trustees, but a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by the section. It was decided in the case of *Re Ray's Settled Estates*, 35 Ch. D. 464, that this section imported not a general notice of an intention to deal with the estate, but a specific notice of the particular sale or lease contemplated by the tenant for life. But by sect. 5 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), it was enacted that—

"(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf (*l*).

"(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

"(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

"(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

"(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act."

By sect. 56 (2) it was enacted that—

Consent of tenant for life.

"In case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof

(*k*) See the section fully set out, *ante*, Vol. III., p. 40.

(*l*) Sub-sect. (1) applies only to sales, exchanges, partitions, and leases: it is therefore still necessary that a notice of an intention to mortgage or charge should be specific. See further as to notices to trustees of settlements under the Settled Land Acts, *ante*, tit. NOTICES, Vol. IV., pp. 115, 116.

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the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail ; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act."

The object of the section appears to be to prevent any conflict arising from the simultaneous exercise by the trustees of their powers vested in them, and in the settlement, and by the tenant for life of the powers given him by the Act.

This section operates to make it necessary for trustees who, under a trust to sell or an imperative power, had no option, to obtain the consent of the tenant for life, since settlements of this nature are by sect. 63 brought within the operation of the Act; and accordingly, by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), sect. 6, it is enacted that in the case of a settlement within section 63 of the Act of 1882, no consents other than those required by the settlement itself shall be necessary to the valid exercise by the trustees or any other person, of any trusts or powers under the Act. By sect. 7 of the same Act it is provided that the powers given by sect. 63 of the principal Act are to be exercised only by the leave of the Court, and by the person to whom such leave is given. This provision will prevent any conflicting exercise of powers.

A settlement upon an absolute trust for sale is not subject to the provisions of sect. 63 of the Act, if there be no person, who by the terms of the settlement itself (as distinguished from the settlement as modified by the Act) is entitled to the income of the money arising from the sale, or from the land until sale, for his life, or any other limited period : *Re Earle* v. *Webster's Contract*, 24 Ch. D. 144 ; *Taylor* v. *Poncia*, 25 Ch. D. 646.

Capital money under the Act.

Consideration money receivable on a sale, whether in the form of a lump sum or a rent-charge, is clearly included in the definition (sect. 2 (9)) of capital money arising under the Act, which is described as " capital money arising under this Act,

and receivable for the trusts and purposes of the settlement."

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Payment of consideration on sale under Settled Land Act.

The consideration money upon a sale under the Settled Land Acts is payable to the trustees of a settlement or into Court, under the 22nd section of the Act of 1882. The section, so far as material, is as follows:—

Regulations respecting investment.

Sect. 22. "(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the discretion of the Court, as the case may be, accordingly.

"(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or directions given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement, and any investment shall be made in the names or under the control of the trustees.

"(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

"(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent."

Contracts for sale.

The tenant for life is empowered by sect. 31 (1) to enter into a contract to do any act for carrying into effect any of the purposes of the Act; and the section further enacts that—

"(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself."

Under these enactments a purchaser dealing with the tenant for life is as secure as regards the per-

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formance of his contract as if he were dealing with an absolute owner; for the contract of the tenant for life binds all those who take in succession after him, and every successor will be bound to carry the contract into effect.

Protection of purchasers.

The Act of 1882 also contains the following provision for the general protection of purchasers, &c., from tenants for life under the Act :—

> Sect. 54. "On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act."

This protection is important as preventing the remainderman (except where there has been fraud on the part of the purchasers) from following the estate in the purchaser's hands, as having been improperly sold and conveyed. As to following specific property into the hands of purchasers and others, see Lewin on Trusts, ch. xxx., pp. 857 *et seq.*

Infants.

When the tenant for life, or a person having the powers of a tenant for life under the Act, is an infant, sect. 60 (*m*) provides that his powers may be exercised on his behalf by the trustees of the settlement, or, if there be none, by such person and in such manner as the Court shall direct : see *post*, p. 69.

Married woman.

Section 61 (*n*) enacts that where a married woman, who, if unmarried, would have been a tenant for life, or have had the powers of a tenant for life, is entitled for her separate use, or as a *feme sole*, under a settlement, or under any statute, shall, without her husband, have the powers of a tenant for life. But if she be not so entitled, she and her husband together are to have the powers of a tenant for life. A married woman's powers under the Act are not restricted by a restraint on anticipation : see subsect. (6) of the section ; but inasmuch as the capital

(*m*) This section is set out at length, *ante*, Vol. III., p. 64.
(*n*) See the section set out, *ante*, Vol. III., p. 68.

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monies arising from any sale of the settled land becomes subject to the trusts of the settlement (see sect. 22 (5)), the restraint on anticipation will attach to the interest of the married woman in the income arising from any investment of the purchase-money.

Lunatic.

In the case of a lunatic, so found by inquisition, who is a tenant for life, or has the powers of a tenant for life under the Act, it is provided by sect. 62, that the committee of his estate, under the order of the Lord Chancellor, or other person entrusted by virtue of the sign manual with the care of lunatics, may exercise the powers of a tenant for life under the Act. If an infant be a lunatic, the ordinary jurisdiction of the Court over its ward is not thereby ousted: *Re Arrowsmith*, 6 W. R. 742; *Beall* v. *Smith*, L. R., 9 Ch. 85; *Re Edwards*, 10 Ch. D. 605; and perhaps on the same principle the Court would, if there were no trustees of the settlement, appoint a person to exercise the powers of an infant tenant for life who happened to be of unsound mind. The committee of the lunatic's estate must obtain the authority of the Court of Lunacy before he can give valid notices under sect. 45: *Re Ray's Settled Estates*, 25 Ch. D. 464.

Statutory powers of sale for special purposes.

Limited owners are also empowered to sell for various specific purposes by a number of statutes. Thus such owners (including lunatics and infants) may sell their lands—

(1.) Under the provisions of the Commons Inclosure Acts (*o*) to enable them to meet the expenses of inclosure.

(2.) Under the Land Tax Redemption Acts (*p*), for the purpose of discharging their estates from land tax.

(*o*) 6 & 7 Will. 4, c. 115; 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70; 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 38; 12 & 13 Vict. c. 100; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43.

(*p*) 38 Geo. 3, c. 60; 42 Geo. 3, c. 116; 54 Geo. 3, cc. 70, 173; 57 Geo. 3, c. 100; 1 & 2 Vict. c. 57; 16 & 17 Vict. cc. 74, 117.

Sales under Statutory Powers.

(3.) Under acts (*q*) empowering the Secretary of State for War to purchase land for the defence of the realm.

(4.) Under the acts empowering limited owners to give or sell land for purposes of a charitable or public nature, for sites for schools (*r*), for the enlargement of churchyards (*s*), and for sites for places of religious worship (*t*).

Lands Clauses Consolidation Act, 1845.

The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), was a general consolidating act passed with the object of enclosing in one enactment all the powers usually given by Parliament to undertakings of a public nature, so that they might be incorporated in any special acts that might be passed in future for any undertaking of that kind.

By this Act limited owners and incapacitated persons, and even those who are restrained by act of parliament from alienating (*Re Earl of Abergavenny*, 19 Beav. 153), are empowered to sell land to the promoters of the undertaking authorised by any special Act in which the principal Act is incorporated.

Owners who derive their power to sell from the Lands Clauses Consolidation Act alone, have no power to fix a price. It must be settled (sect. 9) either by a jury or by arbitration, or by valuation. When the price is determined by a jury it will bind the owner whoever he may be: *Hawkes* v. *Eastern Counties Rail. Co.*, 5 H. L. C. 331; *Potts* v. *Thames Haven Co.*, 15 Jur. 1004; *Douglas* v. *London & North Western Rail. Co.*, 3 K. & J. 173.

The Act makes provision for the payment by the promoters of the undertaking, of all costs rendered necessary by their action, unless the vendor has by his own conduct disentitled himself to such costs.

For further information as to the operation and exercise of the powers of sale conferred on statutory

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(*q*) 5 & 6 Vict. c. 94; 18 & 19 Vict. c. 117; 23 & 24 Vict. c. 112.

(*r*) 4 & 5 Vict. c. 38; 12 & 13 Vict. c. 49.

(*s*) 30 & 31 Vict. c. 133.

(*t*) 36 & 37 Vict. c. 50; 45 & 46 Vict. c. 21.

owners by this Act, see the Treatise of Frend and Ware on the Act, and Dart, V. & P., pp. 211 *seq.* Sales under Statutory Powers.

Sales by Mortgagees.]—Formerly mortgage deeds usually contained trusts or powers of sale enabling the mortgagee to sell the mortgaged property on default of payment at the time specified; but it was generally provided that the power should not be exercised until default should have been made in payment of the principal after the expiration of six months after notice to pay had been given to the mortgagor, or until the interest should have been in arrear for three months. By Lord St. Leonards' Act (23 & 24 Vict. c. 145), sects. 11—24, statutory powers were conferred on mortgagees where the mortgage was by deed, but these powers were seldom relied on in practice, being less favourable to mortgagees than the express powers of sale in ordinary use. Mortgagees.

As regards mortgages made by deed since the 31st of December, 1881, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sects. 19—22, contains provisions conferring on mortgagees powers of sale, and regulating the conditions and manner of their exercise, which generally correspond in form with the express powers of sale formerly in use, but are exercisable if the principal remains unpaid three months after service of notice requiring payment, or if the interest is two months in arrear, or if there has been a breach of any covenant in the mortgage other than the covenant for payment of principal or interest. The subject of sales by mortgagees under express or statutory powers of sale, has been already considered: see *ante*, tit. Mortgages, Vol. III., pp. 918 *et seq.*

Sales by Corporations.]—The classification and description of the various kinds of corporations will be found *ante*, Vol. III., tit. Leases, pp. 45 *et seq.* Corporations.

The management of the lands belonging to the Crown is given, by a long series of Acts of Parliament, to the Commissioners of Woods and Forests. Under these Acts the Commissioners have certain The Crown.

Sales by Corporations.

powers of sale, which may be here briefly referred to, it being observed that there are no restrictions as to the persons with whom the Commissioners may enter into transactions of sale other than those which affect all vendors, with the exception that the Bank of England is not permitted to purchase crown lands without the authority of parliament: see stat. 5 & 6 W. & M. c. 20, s. 29, and 59 Geo. 3, c. 76.

Powers of sale of crown lands are given to the Commissioners under 10 Geo. 4, c. 50; 8 & 9 Vict. c. 99; 11 & 12 Vict. c. 102; 15 & 16 Vict. c. 62; and copyholds may be sold under the authority of 10 Geo. 4, c. 50, and 36 & 37 Vict. c. 36. But the powers so given are to a certain extent restricted: thus, the powers of sale given by 10 Geo. 4, c. 50, extends (see sect. 34) only to lands which are not part of any of the royal forests or chases in England; or (see sect. 98) lands not suited for the growth of timber, which are intermixed with lands of other persons, and are of a value not exceeding 1,000*l.*

The stat. 10 Geo. 4, c. 50, gives also powers of sale over rents, and over manorial and forest rights.

Grants of crown lands for churches, parsonage-houses, or for churchyards, glebe, or schools, may be made under 51 Geo. 3, c. 115; 10 Geo. 4, c. 50, s. 45; or 28 & 29 Vict. c. 69, s. 4.

Duchy of Lancaster.

Sales of property belonging to the Duchy of Lancaster, to the War Department, to sanitary authorities, and to the Post Office, may be made under 36 & 37 Vict. c. 68, s. 7; 38 & 39 Vict. c. 56, s. 178; and 44 & 45 Vict. c. 20, s. 3, respectively. Lands of the duchy may be given for churches and for parsonage-house and glebe under 52 Geo. 3, c. 161, s. 27.

Duchy of Cornwall.

Power to grant lands for sites of churches, chapels, burial-grounds, residences of clergymen or schoolmasters, or for buildings for religious purposes, within the Duchy of Cornwall, is given by 7 & 8 Vict. c. 65, s. 26, and 26 & 27 Vict. c. 49, s. 36.

The stat. 17 & 18 Vict. c. 112, gives power to grant portions of the lands of the Duchies of Lancaster and Cornwall, as sites for buildings for literary and scientific institutions.

Sales by Corporations.

Municipal corporations.

Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the council has power (sect. 109), with the approval of the Treasury, to dispose of any corporate land by way of absolute sale, and by sect. 122 (1) advowsons attached to lands to which a municipal corporation is entitled in its corporate capacity and not as trustees of a charity are to be sold as the Ecclesiastical Commissioners for England shall direct.

Common law corporations.

Grants by corporations (*u*) must be by deed under their common seal: Com. Dig. *Franchise* (F.) 13; and a deed, so sealed, is good without delivery: *Willis* v. *Jermyne*, 2 Leon. 97; Cro. Eliz. 167; Davys. 44 b, Watkin's Conv. *Corporation;* Co. Litt. 36 a (5), 6 Vin. Abr. 267 (G) 2; 292 (k) 2. But

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(*u*) The following note contains, in a somewhat abbreviated form, the observations of the learned authors of this work upon grants by corporations. It is here inserted because the learning is still of some practical value, and not easily otherwise available.

The head cannot grant without some of the body; nor the body without the head.

The acts of a majority present at a meeting, duly summoned, generally bind the whole.

A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot purchase or grant, or make any contract that will bind the corporation: 2 Bac. Abr. 10, Gwill. Ed. *Corporations* (E), 1. So, *e converso*, a bond or contract entered into by the body, in the absence or imprisonment of the head, will not bind: 21 Edw. 4, 12; *Anon.*, 12 Mod. 232; *Rex* v. *Carter*, Cowp. 222, 226. Where no provision is made by the constitution of a corporation (see *Clarke* v. *Imperial Gas Co.*, 4 B. & Ad. 315) the whole are bound by the acts, not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not: *Reg.* v. *Sutton*, 10 Mod. 76; *Att.-Gen.* v. *Davy*, 2 Atk. 212; *Rex* v. *Varlo*, Cowp. 250; Com. Dig. *Franchise* (F. 11). So, though a particular constitution requires the presence of a majority of the whole number, yet the concurrence and consent of a majority of the whole is not necessary: it is sufficient that a majority of the number present concur: *Cotton* v. *Davies*, 1 Str. 53; *Oldknow* v. *Wainwright*, 2 Burr. 1019. So, where a number less than the majority of the whole are, by a particular constitution, competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of a majority of the whole: 2 Bac. Abr. 16.

Validity of unsealed contracts by corporations.

A corporation cannot, generally speaking, do any act except by writing under its common seal: 3 Atk. 475; or by matter of record: *Mayor of Thetford's Case*, 1 Salk. 192: see *Ex parte Annesley*, 2 You. & C. 350; but to this rule there are some exceptions: see Bro. Abr. *Corporation*, pl. 34; 2 Bac. Abr. *Corporation* (E), 3. Thus, an assumpsit may be implied by law between a corporation and a stranger, from their acts, as upon a contract

Sales by Corporations.

if the order for affixing the seal be accompanied by a direction to the clerk to retain the deed until

executed. A corporation may sue a tenant for use and occupation: *Mayor of Stafford* v. *Till*, 12 Moo. 263; 4 Bing. 77; *Dean of Rochester* v. *Pierce*, 1 Camp. 466; *Southwark Bridge Co.* v. *Sills*, 2 C. & P. 371; *Mayor of Carmarthen* v. *Lewis*, 6 C. & P. 608. But whether a corporation can be sued on an implied assumpsit is doubtful: see *Church* v. *Imperial Gas Co.*, 6 A. & E. 834, 838; *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 821; and a corporation can be sued for use and occupation: *Lowe* v. *London and North-Western Rail. Co.*, 18 Q. B. 632; cf. *Finlay* v. *Bristol and Exeter Rail. Co.*, 7 Exch. 409. So, the head of a corporation may give a personal command and do small acts, or acts which require to be done immediately. Thus, he may retain an inferior servant (but not a bailiff: *Horn* v. *Ivy*, 1 Vent. 47; and see 6 Vin. Abr. 288, pl. 10; 1 Salk. 191; 3 Nev. & M. 771), order cattle damage feasant to be driven away or distrained, &c.: *Mayor of Stafford* v. *Till*, 12 Moo. 536; *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 820; see *Att.-Gen.* v. *Davy*, 2 Atk. 212; *Att.-Gen.* v. *Scot*, 1 Ves. sen. 413. The principle of these exceptions is convenience; and in determining what acts may or may not be done without the sanction of the corporate seal, it is necessary to look at the nature and functions of the corporation. Thus, corporations instituted for purposes of trade may, by their authorised agents, accept bills of exchange, and issue promissory notes, without the seal: *Slark* v. *Highgate Archway Co.*, 5 Taun. 792; *Broughton* v. *Manchester Waterworks Co.*, 3 B. & Ad. 1; or enter into any kind of contract which is necessary for the daily transaction of business; *Beverley* v. *Lincoln Gas-light Co.*, 6 A. & E. 829; *Church* v. *Imperial Gas-light Co.*, 6 A. & E. 846; 2 Car. & P. 365; *Henderson* v. *Australian Steam Navigation Co.*, 5 E. & P. 409; *Reuter* v. *Electric Telegraph Co.*, 6 E. & B. 341; *Diggle* v. *London and Blackwall Rail. Co.*, 5 Exch. 540; *Australian Steam Navigation Co.* v. *Marzette*, 11 Exch. 228; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617; *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402; *Re Contract Corporations*, L. R. 8 Eq. 41; *Scott* v. *Clifton School Board*, 14 Q. B. D. 500. But a municipal corporation cannot, except under the common seal, enter into a contract for the making of improvements within the borough: *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; see *East London Waterworks Co.* v. *Bailey*, 12 Moo. 532; *Dunstan* v. *Imperial Gas-light Co.*, 3 B. & Ad. 125; *Clarke* v. *Imperial Gas-light Co.*, 4 B. & Ad. 315; *De Grave* v. *Monmouth*, 4 C. & P. 111.

Corporation, when bound in equity by contract not under their seal.

The rule in equity is the same as at law, and in the absence of fraud no relief can be obtained upon a contract by a corporation that is not legally executed: *Taylor* v. *Dulwich College*, 1 P. Wms. 655; *Maxwell* v. *Dulwich College*, 14th July, 1785, Fonbl. Eq. i., p. 306; *S. C.*, stated 7 Sim. 222; *Winne* v. *Bampton*, 3 Atk. 473; *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188; *Marshall* v. *Corporation of Queenborough*, 1 S. & S. 520; *Wilmot* v. *Corporation of Coventry*, 1 Y. & C. 518. In none of these cases was the requisite equity found to exist; but in *The London and Birmingham*

certain acts are done, the deed will not operate immediately: *Derby Canal Co.* v. *Wilmot*, 9 East, 360. **Sales by Corporations.**

Rail. Co. v. *Winter*, 1 C. & P. 57, Lord *Cottenham*, C., overruled an objection, that there was no mutuality in the agreement because the agent of the corporation had not been appointed under the corporate seal; for, it appearing that the company had subsequently occupied the land, it was held that the other parties would have had their remedy, on equitable grounds against the corporation: see also *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617.

That corporations will not be bound by mere resolutions entered in their books in the absence of special equitable circumstances, see *Carter* v. *Dean of Ely*, 7 Sim. 211.

The seal of a corporate body ought to be proved by a witness acquainted with the impression, and it is not necessary to produce a witness who saw it affixed: *Moises* v. *Thornton*, 8 T. R. 307; *Brounker* v. *Atkyns*, Skinn. 2. In *Doe* d. *Woodmass* v. *Mason*, 1 Esp. 53, it was held by Lord *Kenyon*, that the seal of the City of London proves itself: the seal of the Bank of England appears not to prove itself: *Doe* d. *Bank of England* v. *Chambers*, 4 A. & E. 410. The seal of a corporation should be proved by a witness acquainted with the impression.

Sect. 13 of the Documentary Evidence Act (8 & 9 Vict. c. 113) appears not to apply to deeds or other instruments of the nature under consideration.

If the seal of a corporation is found attached to a document, the onus of proof of any irregularity lies with the corporation: *Clarke* v. *Imperial Gas Co.*, 4 B. & Ad. 315. The presumption of regularity may be rebutted by evidence: *Anon.*, 12 Mod. 423; *Hill* v. *Manchester Waterworks Co.*, 2 Nev. & M. 573; 5 B. & Ad. 866; *Royal British Bank* v. *Turquand*, 5 E. & B. 256; *D'Arcy* v. *Tamar, &c., Rail. Co.*, L. R. 2 Ex. 218. However, on a grant by a corporate body, it is usual to have an attestation. See as to this, *ante*, Vol. II., sub tit. ATTESTATION.

Where a municipal corporation was also local board, and contracted under seal in the latter capacity, it was held that the municipal corporation was liable: *Andrews* v. *Mayor, &c., of Ryde*, L. R. 9 Ex. 302.

A corporation may, by prescription, have more than one corporate name, but not by charter: Cro. Eliz. 351; 3 Salk. 102; Hardr. 504; *Knight* v. *Mayor of Wells*, 1 Ld. Raym. 80; *Mercers of Shrewsbury* v. *Hart*, 1 Car. & P. 113. In the case of *Knight* v. *Mayor of Wells*, which is not intelligible as reported, it would seem that the corporation had given a bond by the name of *the mayor, masters, and burgesses of Wells*, which was the name by which they had been originally chartered, but which, by a subsequent charter, had been changed to that of *the mayor, aldermen, and burgesses*, and that a plea of *non est factum* was allowed. This decision, however, unless it turned upon a point of pleading (see 1 Bos. & P. 40; 1 B. & Al. 699), appears to be bad law. See *Mayor of Lynn's Case*, 10 Rep. 123, where it was resolved that the name of a corporation in grants or conveyances need not be *idem syllabis seu verbis*, but it is sufficient if it be *idem re et sensu*; Misnomer of a corporation.

Sales by Corporations.

Universities and colleges.

By the Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44, s. 1), amended and extended by the Universities and College Estates Act Extension, 1860 (23 & 24 Vict. c. 59, s. 7), restricted powers of sale, enfranchisement, and exchange of lands are given to the Universities of Oxford, Cambridge, and Durham, and their several colleges, and to the colleges of Winchester and Eton.

Ecclesiastical corporations, sole and aggregate.

The Act 14 & 15 Vict. c. 104 (sect. 1), gave temporary powers to ecclesiastical corporations sole and aggregate, with the approval in writing of the Church Estate Commissioners, to sell, enfranchise, or exchange their church lands, and these powers have been amended and extended by various later Acts (*x*), and continued by the Expiring Laws Continuance Acts.

Public companies.

The powers of sale of companies or associations incorporated by royal charter depend upon the terms of the charter: as, for instance, in the recent case of the charter granted to the North British Borneo Company (*London Gazette*, 1881, p. 5448). The law relating to chartered companies is now declared by the 47 & 48 Vict. c. 56.

Lands Clauses Consolidation Act, 1845, s. 127.

Public companies who have acquired lands for the purpose of their undertaking under the powers of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) are required by the 127th section of that Act to sell them again, when they shall have become no longer necessary for the purposes of their undertaking, or, in

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and numerous authorities to that effect were cited: see 10 Rep. 536; *Croydon Hospital* v. *Farley*, 2 Marsh. 174; 6 Taunt. 467; *Doe* d. *Malden* v. *Miller*, 1 B. & Al. 699; *Mayor of Carlisle* v. *Blamire*, 8 East, 486; Cary, 31; *R.* v. *Haughley*, 4 B. & Ad. 650. A bond to "*Dr. Craven*, masters, fellows, &c." of a college, solvendum to "The master, &c." was held a good bond to the corporation: *Sussex and Sydney College* v. *Davenport*, 1 Wils. 184.

With regard to the question of misnomer in bequests to corporations, and the application to such cases of the doctrine of *cy près*, see *infra*, sub tit. WILLS.

Style of municipal corporation.

Under the Municipal Corporation Reform Act, the style of every municipal corporation within the act is the same, namely, "The mayor, aldermen, and burgesses (*or*, citizens) of the borough (*or*, city) of ——": *ante*, p. 61.

(*x*) 17 & 18 Vict. c. 116; 21 & 22 Vict. c. 94; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114.

technical phrase, "superfluous." Superfluous lands (*y*), if not situate within a town and not used for building purposes, must, within a period fixed either by the special Act, or, if no such period is prescribed, then within ten years after the expiration of the time fixed for completion of the works, be first offered to the then owner of the lands from which they were originally severed; then to the owners of lands immediately adjoining; and if no sale be made to these persons, the lands may be offered to others; and should no sale be made at all, the superfluous lands will vest in the adjoining owners in proportion to the extent of their lands adjoining the land in question. The right of pre-emption therefore attaches not to the vendor and his representatives, but to the land, and it is exerciseable by the owner of such land for the time being. The land must be sold absolutely, without reserving to the company any interest therein: *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562; but this will not prevent the company from imposing upon the purchaser such covenants as may most conduce to their own advantage: *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95.

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Infants as Vendors.]—As a general rule an infant has no capacity to contract, and therefore cannot become a vendor or purchaser. This incapacity arises from the absence of the power to exercise a discretion. Thus, an infant cannot validly exercise a power to sell: *Flight* v. *Bolland*, 4 Russ. 298; but he can be empowered to convey and can convey

Incapacity of infants to sell or purchase.

(*y*) As to what is superfluous land, see *Moody* v. *Corbett*, L. R. 1 Q. B. 510; *Carrington* v. *Wycombe Rail. Co.*, L. R. 3 Ch. 377; *Coventry* v. *London, Brighton, and South Coast Rail. Co.*, L. R. 5 Eq. 104; *London and South-Western Rail. Co.* v. *Blackmore*, L. R. 4 H. L. 610; *Lord Beauchamp* v. *Great Western Rail. Co.*, L. R. 3 Ch. 745; *Great Western Rail. Co.* v. *May*, L. R. 7 H. L. 283; *Re Ogilvie*, L. R. 7 Ch. 174; *Betts* v. *Great Eastern Rail. Co.*, L. R. 8 Ex. 294; 3 Ex. D. 182; *Mulliner* v. *Midland Rail. Co.*, 11 Ch. D. 611; *Re Metropolitan District Rail. Co. and Cook*, 13 Ch. D. 607; *Norton* v. *London and North-Western Rail. Co.*, 13 Ch. D. 268; *Hooper* v. *Bourne*, 5 App. Ca. 1; *Hobbs* v. *Midland Rail. Co.*, 20 Ch. D. 418; *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562. The Metropolitan District Railway Company has unrestricted powers of sale over its lands not actually used for the railway: *Toulmin* v. *Budd*, L. R. 18 Eq. 368.

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under a power which is purely collateral: see Sugd. Powers, 177, 8th ed. So in *Re Cardross*, 7 Ch. D. 728, where an infant who by her marriage settlement was empowered, with her husband, to consent to an exercise by trustees of a power of varying investments, was allowed to do so. See also *Re D'Angibau, Andrews* v. *Andrews*, 15 Ch. D. 228.

As regards land, the general rule is that an infant cannot enter into a binding contract to sell, and therefore a contract for sale cannot be enforced against him: *Flight* v. *Bolland*, 4 Russ. 298; *Calvert* v. *Godfrey*, 6 Beav. 97; *Hargrave* v. *Hargrave*, 12 Beav. 408. And even where the infant has executed a deed of conveyance, the deed is void as against him, either during his minority or after his attaining his full age, or against his representatives in the event of his dying under age 4 Bac. Abr. 360 *et seq.*; *Zouch* v. *Parsons*, 3 Burr. 1794; *Anon.* v. *Handcock*, 17 Ves. 383; *Allen* v. *Allen*, 2 Dru. & W. 307. Deeds which carry an interest are apparently only voidable; while deeds which delegate a power but carry with them an interest are void *in toto*. In the case of gavelkind land, an infant can convey land to which he has become entitled by descent, by feoffment, provided he delivers the seisin in person; a livery by attorney would not be operative, as an infant cannot appoint an attorney, for the deed of appointment would be void: 4 Bac. Abr. 49, 50. This power of infants lies outside the purview of the 8 & 9 Vict. c. 106, s. 3 (*y*).

If an infant, holding himself out to be of full age, enters into a contract for sale, he would be compelled to carry the contract into effect, as an infant has no privilege in regard to the commission of fraud: *Bristow* v. *Eastman*, 1 Esp. 172; *Overton* v. *Ban-*

(*y*) A feoffment by an infant is, it is said, on account of its solemnity, not void but only voidable: Co. Litt. 51 b.; *Whittingham's Case*, 8 Co. 42 b.; *Thompson* v. *Leach*, 3 Mod. 310; *Zouch* v. *Parsons*, 3 Burr. 1807. But the appointment of an attorney by an infant is absolutely void, and, of course, livery founded upon such power is also void: 8 Co. 45 a. But it was suggested in *Zouch* v. *Parsons*, that, in order to protect an infant from forfeiture, &c., his feoffment would be treated as void *ab initio*: see *Nightingale* v. *Earl Ferrers*, 3 P. Wms. 210.

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nister, 3 Ha. 503; *Campbell* v. *Ingleby*, 21 Beav. 573; *Hannah* v. *Hodgson*, 9 W. R. 727; *Esron* v. *Nicholas*, 1 De G. & S. 118; *Ex parte Unity, &c., Bank*, 3 De G. & J. 63; *Lemprière* v. *Lange*, 12 Ch. D. 675. But it is necessary that there should have been a distinct misrepresentation in respect of this point on the part of the infant: *Stikeman* v. *Dawson*, 1 De G. & S. 90; *Wright* v. *Snow*, 2 De G. & S. 321; *Nelson* v. *Stocker*, 4 De G. & Jo. 458; *Liverpool Association* v. *Fairhurst*, 9 Exch. 422; *Inman* v. *Inman*, L. R. 15 Eq. 260; *Ex parte Jones*, *re Jones*, 18 Ch. D. 109.

Under the former law all contracts made by an infant during minority might, after his obtaining full age, be ratified, and the contract thereby became binding upon him even though there were no fresh consideration for the ratification, and could be enforced against him: 9 Geo. 4, c. 14, s. 5. Contracts for necessaries, however, required no ratification (*z*). As to what was sufficient to institute a ratification under this statute, see *Harris* v. *Wall*, 1 Exch. 122; *Mawson* v. *Blane*, 10 Exch. 206; *Cornwall* v. *Hawkins*, 20 W. R. 653; *Rowe* v. *Hopwood*, L. R. 4 Q. B. 1; *Maccord* v. *Osborne*, 1 C. P. D. 568.

Infants Relief Act, 1874.

By The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), it is enacted that:—

Sect. 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

Sect. 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(*z*) As to infants' contracts for necessaries, see *ante*, Vol. II., sub tit. Bonds, pp. 272 *et seq.*

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It will be seen that contracts for necessaries are still enforceable apart from any ratification. But the Act entirely destroys the effect of the ratification in respect of every other kind of contract; for though the first section appears to extend only to contracts for repayment of money lent, or for goods supplied or to be supplied, and accounts stated, the second section is wider in its scope. Thus it has been held that ratification was ineffectual in the case of a debt contracted before the Act and ratified after it: *Ex parte Kibble*, L. R. 10 Ch. 373; in a case of a bankrupt infant trader: *Ex parte Jones, Re Jones*, 18 Ch. D. 109 (overruling *Ex parte Lynch*, 2 Ch. D. 227); in the case of a promise to marry: *Coxhead* v. *Mullis*, 3 C. P. D. 439. In order that any arrangement or contract into which an infant has entered may be carried into effect against him after he has attained his full age, it must be shown that, since that time, he has in effect entered into a new contract in equivalent terms: *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410.

Jurisdiction of court over lands of infants.

The Court has no inherent jurisdiction to deal with the land of infants solely on the ground that it will be beneficial for the infant: *Field* v. *Moore*, 7 De G. M. & G. 691; *Calvert* v. *Godfrey*, 6 Beav. 97; *Brookfield* v. *Bradley*, Jac. 634; *Wood* v. *Patteson*, 10 Beav. 541. In all cases where the Court has sold infant's property (unless under express statutory authority), it brought the case within its jurisdiction by declaring the infant's property to be charged with the costs of the suit: *Thackeray* v. *Parker*, 1 N. R. 567; *Davis* v. *Turvey*, 32 Beav. 554; *Hubbard* v. *Hubbard*, 3 H. & M. 38. The Court has now powers under the Partition Act, 1868 (31 & 32 Vict. c. 40, s. 3), to direct a sale instead of a partition, and an infant may request a sale under this section: *Grove* v. *Comyn* L. R. 18 Eq. 387.

Settled Land Act.

By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), it is enacted that:—

Infant absolutely entitled to be as tenant for life.

Sect. 59. "Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Sales by Infants.

Tenant for life, infant.

Sect. 60. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

It was held under the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), that shares in moneys to arise from the sale of land was an interest in land: *Re Durrant and Stonor*, 18 Ch. D. 106. And in *Re Wells*, 31 W. R. 764; W. N. 1883, p. 111, a share in partnership land, to which an infant became entitled in possession on an intestacy, was land within the meaning of sect. 59 of the Settled Land Act, 1882.

In an Irish case, *Re Greenville's Estate*, 11 L. R. Ir. 138, where an infant was entitled in fee to an undivided share of land, the Court, on the application of the guardian of the infant appointed a person to exercise the statutory powers on his behalf for the purpose of concurring with the owners of the other shares in a sale of the land, but refused to appoint for that purpose one of the co-owners.

In *Re Price, Leighton* v. *Price*, 27 Ch. D. 552, the Court, on the application of an infant by his next friend, appointed two persons to be trustees of the settlement created by a will under which the infant was entitled to a copyhold estate to exercise the statutory powers of sale under the Act, and directed the trustees to sell the estate out of Court.

Where it is desired to sell the land of an infant, if there are no trustees of a settlement within the meaning of the Act, the safest course is to apply, as was done in *Re Price*, to the Court to appoint trustees under sect. 38 for the purposes of the Act. The persons so appointed will then be able, without the necessity of any further application, to sell the land and give an effectual receipt for the purchase-money. Otherwise, questions may arise of some doubt and difficulty. If the Court orders a person, not appointed to be a trustee of the settle-

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ment, to sell an infant's lands, a purchaser might raise the objection that such person can only exercise "the powers of a tenant for life" subject to the conditions and to the extent to which a tenant for life could exercise the powers. It could hardly be said with confidence (in the absence of judicial decision) that sect. 60 gives the Court jurisdiction to authorise the person ordered to sell to do so "in such manner" as to be inconsistent with the conditions and restrictions expressly imposed by the Act on the exercise of the powers of a tenant for life. But the power of sale of a tenant for life under the Act can only be exercised after notice of the intention to sell has been given to the trustees of the settlement and their solicitor; and a tenant for life cannot give an effectual discharge for the purchase-money, which must be paid either into Court, or to the trustees of the settlement, whose receipt in writing will be a sufficient discharge to the purchaser. There being no trustees of the settlement, it would seem that a second application to the Court would be necessary to appoint trustees for the purpose of giving a receipt for the purchase-money, unless paid into Court, and also, perhaps, for the purpose of receiving, or waiving notice from the person ordered by the Court to sell (*zz*).

Statutory powers of sale of lands of infants for special objects.

Powers of sale have been given by numerous statutes in order to enable the lands of infants, whether entitled absolutely or as limited owners, to be disposed of for purposes of religion, charity, and other public objects. For a list of statutes including those by which these powers are created, see *ante*, p. 58.

Married Women as Vendors.]—By the common law of England a woman by marriage became, in the eye of the law, a part of her husband; her personality was so merged in his, that, speaking generally, all her property, whether real or personal, passed during the coverture under his control. Thus, in early times a husband had powers by fine or feoffment to

(*zz*) But see *Re Countess of Dudley's Contract*, 35 Ch. D. 338, stated in ADDENDA.

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alienate his wife's lands, so that she could not lawfully enter upon it after his death; but this power was taken away by the stat. 32 Hen. 8, c. 28, s. 4. There was, doubtless, at the time when this principle of law was established, ample reason for it, but the processes of civilization rendered it increasingly less applicable to the changing condition of society. The legislature has therefore, from time to time, interfered to alter the common law so as to give to married women an available property and powers of disposition over their possessions.

Fines and Recoveries Act.

Until the passing of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), the only way in which freeholds belonging to a married woman, not being settled to her separate use (*a*), could be conveyed was by the cumbrous machinery of a fine. By that Act it was provided that every married woman, after 31st December, 1833, might dispose of lands of any tenure, and money invested in lands, and also extinguish powers vested in her, as if she were a *feme sole*; but the deed must be concurred in by the husband, and must be acknowledged (*b*) by the married woman. And by Malins' Act (20 & 21 Vict. c. 57) this power of disposition was extended to reversionary interests in personal estate.

Married Women's Property Act, 1870.

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), sect. 8 (*c*), it was provided that where freehold and copyhold property descends upon a married woman, the rents and profits thereof shall belong to her for her separate use; and the doctrines of equity thus supplied the wife with certain limited powers of disposition over such property. This section does not enable her to deal with the corpus of the property by an unacknowledged deed: *Johnson* v. *Johnson*, 35 Ch. D. 345; see *Re Voss*, *King* v. *Voss*, 13 Ch. D. 504. This Act, however, limits the marital right of the husband in his wife's property

(*a*) As to the equitable doctrine of "separate use," see *ante*, Vol. I., pp. 215 *et seq.*

(*b*) See the subject of acknowledgment by married women fully discussed, *ante*, Vol. I., pp. 208 to 249.

(*c*) See the section set out at length, *ante*, Vol. I., p. 224, and notes thereon.

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only in respect of property coming to her in one way, *i.e.*, under an intestacy, or money of small amount, *i.e.*, under 200*l.*

Married Women's Property Act, 1882.

The effect of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has, however, been much wider. By that statute it is in effect provided (*c*) that the husband shall have no control whatever over the property of a wife if married on or after 1st January, 1883, and that (sect. 5) where the marriage took place before that date, he shall have no rights whatever in property to which his wife's title accrued after the commencement of the Act.

The provisions of the Act have been already commented on in dealing with the subject of Acknowledgments by Married Women: see Vol. I., pp. 208 *et seq.* But since the appearance of that volume there have been several decisions of importance upon the 5th section, and the effect of the words "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder shall accrue after the commencement of this Act." In *Baynton* v. *Collins*, 27 Ch. D. 604, it was held that property to which a married woman was, at the commencement of the Act, entitled in reversion or remainder, and which fell into possession since the Act, was within sect. 5, and that she was absolutely entitled to it. This decision was followed in *Re Thompson* v. *Curzon*, 29 Ch. D. 177, and in *Re Hughes*, W. N. 1885, p. 62. Both these cases, however, seem to have been decided in deference to the authority of *Baynton* v. *Collins*, 27 Ch. D. 604: see also *Dixon* v. *Smith*, 54 L. J. Ch. 904. Subsequently the point was fully reconsidered in the cases of *Re Tucker*, 54 L. J. Ch. 874 (where the title was vested in remainder before the commencement of the Act), and in *Re Adames*, 54 L. J. Ch. 878 (where the title was only contingent before the commencement of the Act), with the result that in both cases it was held that the property in question was not within the 5th section of the Act. These decisions were followed by *Chitty*, J.

(*c*) See the sections set out fully, *ante*, Vol. I., pp. 225 and 226.

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(who had at first decided the other way in *Baynton* v. *Collins*, 27 Ch. D. 604), in the case of *Re Hobron*, W. N. 1885, p. 218; 34 W. R. 195, and by the Court of Appeal in *Reid* v. *Reid*, 31 Ch. D. 402, in which case the title was vested in remainder before the commencement of the Act. The last-mentioned decision may probably be regarded as settling the law on a much disputed point by establishing that the 5th section of the Act (as was anticipated in Vol. I. of this work, p. 228), is limited in its operation to property the title to which *first* accrues on or after the 1st January, 1883.

It follows that as a result of recent legislation, married women, as regards their power to dispose of their property, may be classed under three heads. First, those married before the commencement of the Act of 1870; secondly, those married in the interval between that date and 1st January, 1883; and thirdly, those married on or after the last-mentioned date.

Those who fall within the first of these three classes can dispose absolutely of such property as falls within the operation of section 5 of the Married Women's Property Act, 1882. They can also deal with property settled to their separate use; but as regards any other property, they can convey only with the concurrence of the husband; and if the property be freehold, or a reversionary interest in personalty within the meaning of "Malins' Act" (20 & 21 Vict. c. 57), the deed must be acknowledged under the provisions of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, s. 77 *et seq.*). These provisions have been already considered, *ante*, Vol. I., pp. 234 *et seq.*

Those who come under the second category have slightly increased powers of disposition, inasmuch as money under the value of 200*l.*, or property devolving upon them under an intestacy, has attached to it, by the Married Women's Property Act, 1870, the character and incidents of separate estate, and as such can be dealt with by them. It is, however, to be borne in mind, that the corpus of real estate devolving under an intestacy cannot be dealt with without the concurrence of the husband, and without

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compliance with the provisions of the Fines and Recoveries Act: see *ante*, p. 71.

Women who were married on or after the 1st January, 1883, are to all intents and purposes on the same footing in respect of their power to dispose of property as if they had not been married at all, and can, without any assent on the part of their husbands, deal with their property absolutely.

It must be remarked that, except when the married woman has special powers enabling her, or when the property is settled to her separate use, or is within the operation of the Married Women's Property Act, 1882, she cannot pass the legal estate in land except by deed acknowledged under the Fines and Recoveries Act. This is a point of practical importance which should not be lost sight of. And it must be noted that though the powers of a married woman over land in which she has a separate use are absolute (*Taylor* v. *Meads*, 34 L. J. Ch. 203; and *Pride* v. *Bubb*, L. R. 7 Ch. 68), a mere renunciation of his rights by the husband will not suffice to establish a separate use in the wife; there must be a valid and effectual declaration of trust in her favour: *Dye* v. *Dye*, 13 Q. B. D. 147; and it must also be borne in mind that she has no disposing power during the coverture over property, her title to which cannot accrue till after her husband's death, as the separate use does not attach: see *King* v. *Lucas*, 25 Ch. D. 712; *Re Pride*, *Stafford* v. *Stafford*, 28 Ch. D. 709.

It may also be here noted that when the concurrence of the husband (in a case where otherwise it would have been necessary) is dispensed with under sect. 91 of the Fines and Recoveries Act, the common law rights of the husband are not thereby affected; nor are they destroyed by his wife's alienation under the order: *Fowke* v. *Draycott*, 29 Ch. D. 996.

Bare trustee.

By sect. 6 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), when any freehold or copyhold hereditaments are vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*. As to the meaning of the phrase "bare trustee," see

Christie v. *Ovington*, 1 Ch. D. 279; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 506; *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582; and *Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693. As to conveyance of trust estates by a woman married after 1882, see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sects. 1 and 18. Sales by Married Women.

Lunatics as Vendors.]—It is a well-established rule that a lunatic will not be bound by any deed entered into by him not during a lucid interval. A fine or a recovery, being a conveyance by act of law, was formerly good against a lunatic: *Murley* v. *Sherren*, 8 A. & E. 754; but see *Robert's Case*, 3 Atk. 313; and *Elliott* v. *Ince*, 7 D. M. & G. 475; and, according to the early authorities, a conveyance by a lunatic, though it might be set aside by the committee of his estate during his life, or by his heir after his death, could not be avoided by the lunatic himself on his return to sanity, and this was in accordance with the old doctrine, that no man should be heard to stultify himself by pleading his own insanity: *Beverley's Case*, 4 Rep. 123 b; *Stroud* v. *Marshall*, Cro. Eliz. 398; *Murley* v. *Sherren*, 8 A. & E. 754; *Browne* v. *Joddrell*, 3 C. & P. 30. But this doctrine is exploded, and it is now settled that a lunatic is entitled, on recovering his senses, to avoid his own deed: *Molton* v. *Camroux*, 2 Exch. 487. This former inability of a lunatic to avoid his own deed appears to have been limited to the case of feoffment with livery of seisin: *Thompson* v. *Leath*, Comb. 468; *Beverley's Case*, 4 Rep. 123 b; and it has been decided that a conveyance of an innocent nature, such as an assurance by lease and release, or a grant, is absolutely void: *Yates* v. *Boca*, 2 Str. 1104. The statute 8 & 9 Vict. c. 106, having destroyed the tortious operation of feoffments, has made them also innocent conveyances. Sales by and on behalf of lunatics.

At the same time, when a person, though actually of unsound mind, but apparently sane, enters into a contract with a person who has no notice of the insanity, and the contract has been carried into effect, and it is no longer possible to remit the parties to their respective positions as they were

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before the contract, the contract will not be set aside: *Niell* v. *Morley,* 9 Ves. 478; *Williams* v. *Wentworth,* 5 Beav. 325; *Selby* v. *Jackson,* 6 Beav. 192; *Molton* v. *Camroux,* 4 Exch. 17; *Frost* v. *Beavan,* 17 Jur. 369; *Beavan* v. *Macdonnell,* 10 Exch. 184; *Campbell* v. *Hooper,* 3 Sm. & G. 153; *Elliott* v. *Ince,* 7 De G. M. & G. 475.

The two last-mentioned rules are apparently conflicting, and there is still some doubt how far the proposition last stated is applicable to the case of contracts for the sale or purchase of land, but it is submitted that where a sale transaction with a lunatic is embraced within the terms of the proposition, and has been perfected by a conveyance of the property executed by the lunatic, such conveyance will not be set aside: see the remarks of *Truro,* C., in *Price* v. *Berrington,* 3 Mac. & G. 498, and of *Cranworth,* C., in *Elliott* v. *Ince,* 7 De G. M. & G. 487. It may be observed that mere executory contracts will not be enforced against one who was of unsound mind at the date of the contract, if the other contracting party had, even though subsequently to the date of the contract, knowledge of the unsoundness of mind.

If a lunatic during a lucid interval executes a deed, it is good: *Hall* v. *Warren,* 9 Ves. 610; *Creagh* v. *Blood,* 2 Jo. & L. 509; *Selby* v. *Jackson,* 6 Beav. 192; *Essex* v. *Daniell,* L. R. 10 C. P. 543.

As to the evidence admissible in order to fix the other party with notice of the lunacy: see *Beavan* v. *Macdonnell,* 10 Exch. 184, and *Greenslade* v. *Dare,* 20 Beav. 284.

When a lunatic has been so found by inquisition, his property can be dealt with only under the powers of the Lunacy Regulation Act, 16 & 17 Vict. c. 70. Reference may be made to this Act, and to the statute 25 & 26 Vict. c. 86, and to the General Orders in Lunacy, dated 7th November, 1853. Certain limited powers of dealing with the land of a lunatic are also conferred by the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18, s. 7) (*d*), by the Leases

(*d*) As to procedure when the vendor is a lunatic and no committee has been appointed, see *Midland Rail. Co.* v. *Oswin,* 1 Coll 74.

and Sales of Settled Estates Act (19 & 20 Vict. c. 70), and by the Settled Land Act, 1882 (45 & 46 Vict. c. 38). By sect. 119 of the Lunacy Regulation Act, property dealt with under the Act retains its original character as personalty or realty, as the case may be (cf. *Re Wharton*, 5 De G. M. & G. 33, a case under the former Act of 11 Geo. 4, and 1 Will. 4, c. 65), and the Court, in exercising its powers over the property of a lunatic, is careful to do so in such a manner as to preserve to it the original character: *Re Pares, Lillington* v. *Pares*, 12 Ch. D. 333; *Re Ryder*, 20 Ch. D. 514. Sales by Lunatics.

As to the necessity of the acknowledgment of deeds dealing with land of a lunatic *feme covert*, see *Re Stables*, 4 De G. J. & S. 257.

Sales by Trustees in Bankruptcy.]—The trustee of a debtor's property has extensive powers of disposition given him by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), in order to enable him to realise the assets of the debtor's estate to the best advantage for the benefit of the creditors. Sect. 50 of that Act (see *ante*, Vol. II., p. 454) gives him power to acquire possession of all property of a transferable nature; the vesting of property in him is provided for by sect. 54 (see *ante*, Vol. II., p. 456), and by sect. 56 (*ante*, Vol. II., p. 457) he is empowered to sell, by public auction or private contract, the whole or any part of the debtor's property, and to give valid receipts for the purchase-money (*dd*). In bankruptcy.

2. Who may be Purchasers.

Purchases under Express Powers.]—Settlements, by deed or will, of real estate usually, and personalty settlements not unfrequently, comprise trusts or powers directing or enabling the trustees under certain conditions to invest capital or other monies arising under the settlement, in the purchase of land. In exercising any powers of this kind, regard Powers in settlements, &c., to purchase land.

(*dd*) As to the power of the official receiver, acting as trustee, to sell a bankrupt's property, see *Turquand* v. *Board of Trade*, 11 App. Ca. 286.

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must, of course, be had to any directions or restrictions contained in the instrument creating the power.

Duty of trustees as regards value of property purchased.

In purchasing under powers, it is specially necessary for trustees to take the most effectual means for arriving at a sound view of the actual value of that which they are about to buy. To this end it may be said to be essential that they should not rely upon any value laid upon them by the intending vendor, but should employ a valuer on their own behalf: *Leigh* v. *Partridge*, 34 Beav. 312.

Duty as regards title.

Trustees should be careful to enter into no agreement by which they are precluded from getting a good marketable title: *Eastern Counties Rail. Co.* v. *Hawkes*, 5 H. L. C. 363; *Ex parte the Governors of Christ's Hospital*, 2 H. & M. 166. But by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sects. 1, 2, and 3, trustees were empowered to accept a forty years' title on purchasing freeholds, and on buying leaseholds to dispense with the production of the lessor's title. Further freedom has since been given to trustees by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), by sect. 3 of which Act certain conditions of sale are implied in all open contracts, or all contracts in which the implication is not expressly negatived (*e*); and by sect. 66 of the same Act, trustees are expressly protected in adopting and acting upon these provisions of this Act. If the money about to be invested is in Court, the trustees must obtain the sanction of the Court in order to enable them to invest; for after an administration decree, or any other proceeding giving the Court seisin of the case, the powers of management and discretion vested in the trustees are subject to the control of the Court: *Bethell* v. *Abraham*, L. R. 17 Eq. 24; *Minors* v. *Battison*, L. R. 1 App. Ca. 428.

What property may be purchased.

The power of trustees to purchase personal property under special powers usually resolves itself into what is commonly known as the power of investment. All properly drawn settlements contain directions upon this head, which the trustees are

(*e*) See *ante*, Vol. II., sub tit. CONDITIONS OF SALE, pp. 632 *et seq.*

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bound to observe. The terms of investment clauses vary according to circumstances in respect of the extent of the power and the conditions of its exercise, and will be fully considered in a later volume, sub tit. SETTLEMENTS.

Trustees purchasing must not benefit some beneficiaries at the expense of others.

In exercising a power of purchasing real estate, trustees are bound to invest in property which will not, in its nature, be or become unfair, as between their various *cestuis que trustent.* This is an application of the rule that it is a trustee's duty to hold the balance evenly between his various beneficiaries: *Raby* v. *Ridehalgh,* 7 De G. M. & G. 104; *Harrison* v. *Theaton,* 4 Jur. N. S. 550; *Davies* v. *Westcomb,* 2 Sim. 425. Thus an estate, the value of which largely depends upon its timber, should not be bought, for in such a case the tenant for life, if without impeachment of waste, could, by felling timber, appropriate a considerable portion of the corpus of the property: *Burges* v. *Lamb,* 16 Ves. 174. But in *Bellot* v. *Littler,* W. N. 1874, p. 156, mines under the settled property and under lands adjoining were permitted to be purchased. It has been held that ground rents are not a proper subject of purchase by trustees under a trust to buy freeholds: *Read* v. *Shaw,* Sug. Power (App.), 953; but in the case *Re Peyton's Settlement,* L. R. 7 Eq. 463, it was held that trustees having power to invest money in the purchase of lands or hereditaments in fee simple, may invest in the purchase of freehold ground rents. Under a trust to invest in the purchase of realty, leaseholds are not as a general rule proper to be purchased: *Re Chennell, Jones* v. *Chennell,* 8 Ch. D. 492; see also *Re Boyd's Settled Estates,* 14 Ch. D. 626; *Leigh* v. *Leigh,* W. N. 1886, p. 191. As regards copyholds for lives, see *Turner* v. *Harrison,* 17 Sim. 111.

Conveyance to trustees.

It is important that the property, when purchased, should be properly conveyed to the trustees. It may be undesirable that the trust under which the purchase is effected should be disclosed; as the vendor may thereby be burdened with the duty of seeing that the purchase is a proper execution of the trust. In such cases, the actual conveyance will

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be to the trustees themselves; but the trustees would, as a matter of course, contemporaneously execute a declaration of trust, or a settlement of the property. To neglect this precaution would lead to difficulty, and possibly to considerable expense: *Lane* v. *Dighton*, Amb. 413; *Anon. Case*, Sel. Ca. in Ch. 57; *Denton* v. *Davies*, 18 Ves. 499; *Price* v. *Blakemore*, 6 Beav. 507; *Mathias* v. *Mathias*, 3 Sm. & G. 552; *Hopper* v. *Conyers*, L. R. 2 Eq. 549; *Sealy* v. *Stawell*, 2 I. R. Eq. 326.

When the trust is to purchase and settle land, the question of the terms of the settlement will be decided according to the special circumstances of each case, and as a rule it will be found best not to embody the settlement in the conveyance, but to convey the property to the trustees, leaving it to them to execute the settlement as they may be advised.

But where, as more frequently happens, the purchase is made by the trustees of an existing settlement, the customary course is to convey the land to the trustees, and to embody the settlement of the land in the conveyance by a clause referring the trusts and powers of the original settlement. It not unfrequently happens that in these cases considerable care is necessary in order that the conveyance may be in such a form as to vest the land upon the trusts and subject to the limitations which are at the time existing under the settlement, in consequence of births, marriages, or deaths, or of dealings with the estates limited by the settlement, which may have taken place. Thus, the tenant for life may have sold his life interest, or the trustees of a term of years created by the settlement may be dead; and in both instances an inartificial reference to the terms of the settlement may fail to effect a proper settlement of the purchased property. The circumstances of each case vary; and the clause referring to the original settlement must be carefully adapted to each case (*f*).

It may here be noted that a vendor cannot insist

(*f*) Examples of clauses of this nature will be found in the Precedents following this Dissertation.

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upon being satisfied that the form in which the trustees propose to take their conveyance is a proper one. The vendor in such a case, can do no more than require his purchasers to show him that the conveyance contains no incorrect recitals, a point upon which vendors are in all cases entitled to protect themselves: *Hartley* v. *Burton*, L. R. 3 Ch. 365; *Mansfield* v. *Childerhouse*, 4 Ch. D. 82.

Settled Estates Act, 1877.

Purchases under Statutory Powers.]—Under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), the purchase-money of lands sold by order of the Court may (sect. 34) be paid to trustees approved by the Court, or otherwise into Court, and is to be applied as the Court shall from time to time direct, to some one or more of several purposes specified in the section, one of which is, "The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid;" but, if the Court shall so direct, the money may be applied by the trustees without any application to the Court.

Settled Land Act, 1882.

The corresponding provisions of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), differ from the provision just referred to in making the application of money generally dependent upon the direction of the tenant for life. Capital money arising under the Act may, when received, be applied, amongst other modes (sect. 21):—

Capital money under Act: investment, &c.

"(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land being copyhold or customary land.

"(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life.

"(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land.

Purchases under Statutory Powers.

"(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals, convenient to be held or worked with the settled land, or of any easement, right, or privilege covenient to be held with the settled land for mining or other purposes."

The payment of the purchase-money must be made as directed by the tenant for life; for by sect. 22, it is provided that:—

Regulations respecting investment, devolution, and income of securities, &c.

Sect. 22. "(1.) Capital-money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be accordingly (*ff*).

"(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust-money of the settlement; and any investment shall be in the names or under the control of the trustees.

"(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

"(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

"(5.) Capital-money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital-money is made, shall for all purposes of disposition, transmission, and devolution, be considered as land, and the sums shall be held for and go to the same persons accordingly, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

"(6.) The income of those securities shall be paid or applied as

(*ff*) A tenant for life who consents to the payment of capital money into Court, is to be deemed to have exercised his option, and the money must remain in, and be invested or applied under the direction of the Court: *Cookes* v. *Cookes*, 34 Ch. D. 498.

Purchases under Statutory Powers.

the income of that land, if not disposed of, would have been payable or applicable under the settlement.

"(7.) Those securities may be converted into money, which shall be capital-money arising under the Act."

The selection of the lands to be bought is limited by sect. 23, which provides that "capital money arising under the Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same."

The mode of dealing with the land so purchased is provided for by sect. 24, which is as follows :—

Settlement of land purchased, taken in exchange, &c.

Sect. 24. "(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

"(2.) Freehold land shall be conveyed to the use, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging (*g*).

"(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go (*h*).

(*g*) With regard to the increase or multiplication of charges, see *Hindle* v. *Taylor*, 5 De G. M. & G. 577 ; and *post*, tit. SETTLEMENTS.

(*h*) The corresponding clause in Lord Cranworth's Act did not contain the last words of this sub-section. They are, however, usually found in the common form in settlements: their omission was objectionable, as upon the death under age of the first tenant in tail, the leasehold simply reverted to the settlor: *Gosling* v. *Gosling*, 1 De G. J. & S. 16; *Christie* v. *Gosling*, L. R. 1 H. L. 279. The sub-section will operate so as to keep the leaseholds

Purchases under Statutory Powers.

"(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition (*i*).

"(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

"(6.) On land being so acquired, any person who by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

"(7.) The provisions of this section referring to land extend and apply as far as may be to mines and minerals, and to easements, rights, and privileges over and in relation to land."

As regards the security of a person contracting with a tenant for life for the sale of property, see sects. 31 and 54 of the Act, and *ante*, pp. 55, 56.

Purchases by Corporations, &c.]—Corporations cannot hold land unless a licence for that purpose has been granted by the Crown, or under special statutory power. The lord also was formerly entitled to prevent a grant by his tenant to a corporation, unless with his licence: 2 Black. Com. 269; but the licence of the lord is now no longer necessary: 7 & 8 Will. 4, c. 37. The Crown is, of course, not affected by any limitation of this nature.

Municipal corporations.

Under the Municipal Corporations Act, 1882

subject to the trusts of the settlement until they vest in some issue in tail or in some tenant in tail by purchase who attains full age. See as to *quasi* entails, and their construction, *Allen* v. *Allen*, 2 Dr. & W. 337; *Foley* v. *Burnell*, 1 Br. C. C. 274; and sub tit. SETTLEMENTS.

(*i*) As to substitution of securities, see sect. 5 of the Act, *ante*, p. 44.

(45 & 46 Vict. c. 50), a municipal corporation has power (sect. 105) to purchase land not exceeding five acres for certain specific purposes, and by sect. 107, where a municipal corporation has not power to purchase or acquire land, a purchase may be effected with the approval of the Treasury. Purchases by Corporations.

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), any local authority may (sect. 175) for the purposes and subject to any provisions of the Act purchase any lands, whether situated within or without their district.

Under the Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44), all moneys which on any sale, enfranchisement, or exchange under that Act are received by or for the benefit of the Universities of Oxford, Cambridge, and Durham, and their several colleges, and the colleges of Winchester and Eton may be laid out (sect. 1) in the purchase of other lands contiguous to or convenient to be held with lands belonging to such universities respectively, or to any such college. And by the Act 14 & 15 Vict. c. 104, ecclesiastical corporations, sole and aggregate, are empowered (sect. 6) to lay out the moneys received on any sale, exchange, or enfranchisement under that Act in the purchase of other lands to be conveyed to the use or for the benefit of such corporation. Universities, &c., and Ecclesiastical Corporations.

The churchwardens and overseers of a parish are a *quasi* corporation; and the real property belonging to a parish vests in them: Smith L. & T. 73. By parish officers.

By stat. 59 Geo. 3, c. 12, s. 12, the churchwardens and overseers of the poor of any parish are empowered, with the consent of the inhabitants in vestry assembled, to purchase lands to the extent of twenty acres, to be used for the employment of the poor; by stat. 1 & 2 Will. 4, c. 42, s. 1, the quantity was increased to fifty acres.

The powers of purchasing thus given to the churchwardens and overseers are, by 5 & 6 Will. 4, c. 69, transferred to the guardians of the poor, or where there are no guardians, to the overseers, under the control of the Local Government Board.

Charitable and *quasi*-charitable bodies can as a Charities.

Purchases by Corporations.

rule purchase, subject only to the restraints of the Mortmain Act, 9 Geo. 2, c. 36, and of the Acts relating thereto. In several instances, however, these restrictions have been relaxed in favour of purchases of small portions of land for specific purposes. Thus a conveyance of a site for a school under 4 & 5 Vict. c. 38, may be attested by one witness only, but apparently must still be enrolled; though by 7 & 8 Vict. c. 37, s. 3, the death of the donor or grantor within twelve calendar months will not avoid it (*i*). So grants may be made for sites for literary and scientific and similar institutions (17 & 18 Vict. c. 112); and for recreation and playgrounds (22 Vict. c. 27).

Incorporated charities may also, with the assent of the Charity Commissioners, invest money arising from the sale of land belonging to the charity, or arising from exchange or partition in the purchase of land: and for this purpose no licence in mortmain will be necessary (*k*). Certain charitable bodies can now be incorporated without losing their power to hold land without a licence in mortmain: see 35 & 36 Vict. c. 24.

The question of mortmain and the power of charities to purchase and hold land has already been dealt with in a former volume of this work: see *ante*, Vol. IV., tit. MORTMAIN.

Public companies.

The promoters of public companies incorporated by special Acts of Parliament are generally empowered to purchase lands for the purposes of their undertaking by the Lands Clauses Consolidation Act, 1845; which Act is usually incorporated, either in part or in the whole, in the special Acts whereby public undertakings are authorized.

Proceedings under Land

The company may proceed (1) by way of agreement with the owners of the land (*l*) (sects. 6 to 15),

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(*i*) See also 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; and 15 & 16 Vict. c. 49.

(*k*) 18 & 19 Vict. c. 124.

(*l*) Equitable tenants for life may contract to sell, but it has been held that the legal estate must be, if necessary, conveyed by the trustees, and they may be compelled to do so: *Lippincott* v. *Smith*, 29 L. J. Ch. 520. Now, however, equitable tenants for

Purchases by Corporations.

Clauses Act, 1845.

or (2) under their compulsory powers (sect. 16 *et seq.*). Under sects. 7 and 8 certain parties under disability are enabled to enter into agreements, and sell and convey and exercise other powers; but under sect. 9 the price to be paid to a party under disability must not, unless determined in one of the methods prescribed in subsequent sections of the Act, be less than the valuation of certain able, practical surveyors. Subject to sect. 9 the price may, in whichever of the two methods the company proceed, be a matter of agreement, or, if no agreement can be come to, may be determined by two justices, or by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices as in the Act provided; but the last-mentioned methods are only applicable to a purchase by the company under their compulsory powers. When the company have proceeded by way of agreement and cannot come to terms with the parties interested, they may always have recourse to their compulsory powers.

When the title is defective, or no title is made, or the owner cannot be found or refuses to accept the purchase-money or to convey, the company can proceed under sects. 75, 76 and 77. Under these sections the company, upon depositing in the bank the purchase-money or compensation agreed upon or awarded to be paid, may execute a deed-poll containing a description of the land taken, and recitals of the circumstances under which it was taken, and such deed-poll will vest the property in them for all the estate and interest in the lands of the parties for whose use and in respect whereof the deposit was made.

A notice given by a public company under the Act of their intention to exercise their compulsory powers constitutes a contract binding on the company so far as regards the extent of the land to be taken: *Adams* v. *Blackwall Rail. Co.*, 2 Mac. & G.

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life can convey the legal estate in settled lands directly to a purchaser by exercise of their statutory power under the Settled Land Act, 1882; see *ante*, p. 49.

Purchases by Corporations.

118 ; and when the price of the land has been ascertained, whether by agreement, arbitration, or a verdict of a jury, the contract is complete, and is binding on all parties (*m*).

When the notice is of an intention to take a part only of any house or other building or manufactory, the owner may, by a counter notice under sect. 92, require the company to take the whole or none ; and the company will be compelled to do so. The meaning of the word "house," or "manufactory," has been the subject of much judicial decision. The result of the cases (*n*) appears to be that any part of the property which is in any way important to the proper enjoyment of the house is included in the term. And the same principle seems to have been applied to the interpretation of the word "manufactory" (*o*).

For further information as regards the exercise of powers under the Lands Clauses Act, see Frend and Ware's Railway Precedents.

Joint stock companies.

Joint Stock Companies registered under the Companies Acts are empowered to hold lands without licence : stat. 25 & 26 Vict. c. 89, s. 18. But this power is confined to such companies as are in their nature trading companies, and have no tendency to hold land and withdraw it from the possibility of alienation. Companies registered under the Acts, which are formed for the purpose of promoting art,

(*m*) *Haynes* v. *Haynes*, 1 Dr. & S. 426 ; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575 ; *Re Arnold*, 32 Beav. 591 ; *Harding* v. *Metropolitan Rail. Co.*, L. R. 7 Ch. 154 ; *Watts* v. *Watts*, L. R. 17 Eq. 217.

(*n*) *Reg.* v. *London and South-Western Rail. Co.*, 12 Q. B. 775 ; *St. Thomas's Hospital* v. *Charing Cross Rail. Co.*, 1 J. & H. 400 ; *Cole* v. *West London Rail. Co.*, 27 Beav. 242 ; *King* v. *Wycombe Rail. Co.*, 28 Beav. 104 ; *Fergusson* v. *London and Brighton Rail. Co.*, 33 Beav. 103 ; *Sparrow* v. *Oxford, &c., Rail. Co.*, 2 De G. M. & G. 94 ; *Pinchin* v. *Blackwall Rail. Co.*, 1 K. & J. 43 ; *Steele* v. *Midland Rail. Co.*, L. R. 1 Ch. 275 ; *Marson* v. *London, Chatham, and Dover Rail. Co.*, L. R. 6 Eq. 101 ; *Salter* v. *Metropolitan Rail. Co.*, L. R. 9 Eq. 432 ; *Faulkner* v. *Somerset Rail. Co.*, L. R. 16 Eq. 458 ; *Richards* v. *Swansea Improvements, &c., Co.*, 9 Ch. D. 425 ; *Barnes* v. *Southsea Rail. Co.*, 27 Ch. D. 536.

(*o*) *Gibson* v. *Hammersmith Rail. Co.*, 9 Jur. (N. S.) 221 ; *Barker* v. *North Staffordshire Rail. Co.*, 2 De G. & S. 55 ; *Dakin* v. *London and North-Western Rail. Co.*, 3 De G. & S. 414 ; *Furniss* v. *Midland Rail. Co.*, L. R. 6 Eq. 473.

science, religion, charity, or any other like object, not involving the acquisition of gain by the company, or the individual members thereof, may not hold more than two acres of land without the sanction of the Board of Trade. The Board of Trade may, however, grant a licence to such companies to hold lands in such quantity and subject to such conditions as the Board of Trade may think fit: stat. 25 & 26 Vict. c. 89, s. 21. See *ante*, tit. MORTMAIN, Vol. IV., p. 22.

Purchases by Corporations.

Infants as Purchasers.]—Contracts of purchase by infants are governed by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62, s. 2), and a vendor to an infant appears to be generally at the infant's mercy, for there appears to be no means by which an infant, on attaining his full age, can ratify his contract.

Purchases by infants.

Circumstances may, however, be such as to make a complete repudiation by the infant impossible. For instance, if an infant represents himself as of full age, he would probably not be allowed to repudiate his contract. And it has been laid down that an infant cannot recover money actually paid by him: *Wilson* v. *Kearse*, 2 Peake N. P. C. 196; *Ex parte Taylor*, 8 De G. M. & G. 254. It has been held that an infant who had paid a premium for a lease, and entered and then repudiated, could not recover the premium: *Holmes* v. *Blogg*, 8 Taunt. 508. What in the case of a purchase of land by an infant would be held to preclude him from subsequently repudiating and reclaiming the purchase-money, is not clear; but probably any alteration of the corpus sufficient to prevent him from returning it to the vendor in the state in which it was conveyed to him would have such an operation: see *Blackburn* v. *Smith*, 2 Exch. 783.

Married Women as Purchasers.]—At common law a married woman was absolutely incapable of entering into a contract, unless as the agent of some other person. A contract entered into by her on her own behalf might have been set aside either by her husband, or after his death by herself or by her representatives: *Granby* v. *Allen*, 1 Ld. Raym. 224; *Barnfather* v. *Jordan*, 2 Doug. 452; *Emery* v. *Wase*,

Purchases by married women.

Purchases by Married Women.

5 Ves. 848; *Field* v. *Moore*, 19 Beav. 176; *Nicholl* v. *Jones*, L. R. 3 Eq. 696. But when the equitable doctrine of separate estate grew up, it was held that a married woman could, by her contract, bind her separate estate, or at least such separate estate as, at the date of the contract, she was possessed of: *Owens* v. *Dickenson*, Cr. & P. 48; *Picard* v. *Hine*, L. R. 5 Ch. 274; *Mayd* v. *Field*, 3 Ch. D. 587; *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Hodgson* v. *Williamson*, 15 Ch. D. 87. No decree *in personam* could be made against a married woman: the order in such cases affected only her property: *Nantes* v. *Corrock*, 9 Ves. 189; *Aylett* v. *Ashton*, 1 My. & C. 112; *Francis* v. *Wigzell*, 1 Madd. 258. Nor would any contract bind subsequently-acquired separate estate: *Roberts* v. *Watkins*, 46 L. J. (Q. B.) 552; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454. Nor are the powers of married women in this respect increased by the Married Women's Property Act, 1870: *Howard* v. *Bank of England*, L. R. 19 Eq. 295; *Ex parte Holland, re Heneage*, L. R. 9 Ch. 307; *Ex parte Jones, re Grissel*, 12 Ch. D. 484.

Married woman's power to contract.

But under sect. 1, sub-sects. 2, 3, & 4, of the Married Women's Property Act, 1882, a married woman can enter into valid contracts which will bind any separate property she may have at the date of the contract, and also any separate property to which she may subsequently become entitled. She can accordingly now become a purchaser, and, if actually possessed of separate estate, can be made liable, to the extent of property belonging or subsequently accruing to her, for any breach of such contract. The 4th sub-section of sect. 1 of the Act is, however, not retrospective; and accordingly where a contract was made by a married woman before the Act it was held that judgment could not be given against her for breach of the contract in such a manner as to be available against separate property to which she became entitled after the date of the contract: *Turnbull* v. *Forman*, 15 Q. B. D. 234. It has also been held that a married woman, who has not at the time any separate property, cannot enter into a contract which will bind subsequently-acquired separate pro-

Purchases by Married Women.

perty: *Re Shakespear, Deakin* v. *Lakin*, 30 Ch. D. 169. It follows that unless a married woman has, at the date of the contract, separate property, it cannot be enforced against her. It still then is a matter of importance to ascertain whether a married woman has or has not separate property before entering into a contract with her.

It has also been held that a married woman can be dealt with as a *feme sole*, in respect of a contract made before the Act, so far as regards property which can be affected by such contract: see *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 533; and see and compare *Durrant* v. *Ricketts and Wife*, 8 Q. B. D. 177; and *Bursill* v. *Tanner*, 13 Q. B. D. 691.

When there is a restraint on anticipation, considerable difficulty still arises. Formerly, there was no means of getting rid of this restraint: *Robinson* v. *Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535; *Prilling* v. *Brooking*, 25 Beav. 218; *Baggett* v. *Meux*, 1 Phill. C. C. 628; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454. But by sect. 39 of the Conveyancing and Law of Property Act, 1881 (*p*), a power is given to the Court, with the consent of a married woman, to bind her interest in any property, notwithstanding a restraint on anticipation. As to the conditions under which the Court will exercise its powers, see *ante*, Vol. I., p. 229.

Lunatics.

Lunatics as Purchasers.]—A contract for purchase entered into by a lunatic may be set aside by his committee after inquisition (*Att.-Gen.* v. *Parkhurst*, 1 Eq. Cas. Abr. 278), or by the Crown for the benefit of the lunatic after office found (Co. Litt. 247 a), or by his representatives after his death (Co. Litt. 2 b; 2 Bl. Com. 272; *Steed* v. *Culley*, 1 Keen 620); but if he recover his senses and confirm the purchase, his representatives would appear to be unable to avoid it. Whether he could, on recovering his senses, himself avoid the transaction is perhaps questionable: but see *Beverley's Case*, 4 Rep. 123 b.

(*p*) 44 & 45 Vict. c. 41. See *ante*, Vol. I., p. 229, where the section is set out at length.

Purchases by Lunatics.

Aliens formerly incapable of acquiring land.

Aliens as Purchasers.]—At common law an alien could not hold land by a secure title, as the Crown could at any time claim the property: Co. Litt. 2 b; *Rex* v. *Holland*, Aleyn. 14. The right of the Crown was exerciseable at any time and without any inquisition or office found: see stat. 22 & 23 Vict. c. 21, s. 35. As a vendor cannot as a rule give a better title than he himself possesses, any sale by an alien, though in every other respect valid, would be subject to the right of the Crown to re-enter: Shep. Touch. 232.

The right of the Crown attached to the property when in the possession of the alien or his trustees: *Barrow* v. *Wadkin*, 24 Beav. 1 (where *Rittson* v. *Stordy*, 3 Sm. & G. 230, is expressly dissented from); *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343; and compare *Fourdrin* v. *Gowdey*, 3 My. & K. 383; and *Du Hourmelin* v. *Sheldon*, 4 My. & C. 525. It extended also to leases for years: Co. Litt. 26; *Rex* v. *Eastbourne*, 4 East, 107; *Lapierre* v. *M'Intosh*, 9 A. & E. 857; at all events when the alien was the grantor of the lease: see *Wootton* v. *Steffenoni*, 12 M. & W. 129. There was an exception made to the rule by 32 Hen. 8, c. 16, s. 13, which permitted alien merchant friends to acquire houses for their own habitation and to hold them during their lives and residence within the realm. This exception was afterwards altered and extended by the Act 7 & 8 Vict. c. 66. By sect. 5 of that Act a resident alien friend might hold any lands, houses, or other tenements for the purposes of residence, or carry on his business for any time not exceeding twenty-one years, as if he were a natural-born subject.

Naturalization Act, 1870.

The last-mentioned Act has been repealed by the Naturalization Act, 1870 (33 Vict. c. 14), which provides as follows:—

Sect. 2. "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien, in the same

manner in all respects as through, from, or in succession to, a natural-born British subject." Purchases by Aliens.

The Act is limited to the United Kingdom: sect. 2, sub-sect. 1; and is not retrospective: sect. 2, sub-sect. 3; see *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343.

Convicts as Purchasers.]—Formerly attainder for treason or felony occasioned civil death; and one of the consequences was the forfeiture and escheat of the property of the attainted person. Persons who were charged with treason or felony, therefore, occasionally executed conveyances and assignments in order to elude this result of attainder or conviction. Such devices are now unnecessary. Convicts.

Forfeiture and escheat by reason of the corruption of blood arising from attainder or conviction for treason, felony, or felo de se, were abolished by the statute 33 & 34 Vict. c. 23, but the Act expressly excludes from its operation forfeiture upon outlawry. But the Act, while abolishing civil death to this extent, imposes certain disabilities upon convicts. It defines a convict as one against whom judgment of death or penal servitude has been pronounced or recorded by a court of competent jurisdiction upon any charge of treason or felony. And with respect to the property of persons coming within that definition, the Act enacts as follows:—

Sect. 7. "When any convict shall die or be made bankrupt, or shall have suffered any punishment to which sentence of death if pronounced or recorded against him may be lawfully commuted, or shall have undergone the full term of penal servitude for which judgment shall have been pronounced or recorded against him, or such other punishment as may by competent authority have been substituted for such full term, or shall have received her Majesty's pardon for the treason or felony of which he may have been convicted, he shall henceforth, so far as relates to the provisions hereinafter contained, cease to be subject to the operation of this Act."

By sect. 8 convicts are rendered incapable of bringing actions, &c., or of alienating property or making contracts, except as provided by the Act.

It will be observed that when a convict becomes

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bankrupt, he ceases, so far as regards his property, to be subject to the provisions of the Act. This enactment seems to provide effectually for the interests of a convict's creditors, as they would have the same rights against his property as if he were not subject to any incapacity. With this exception, the incapacity of a convict to buy or sell land or chattels is complete.

This disability arises upon the pronouncing or recording of the judgment; and therefore, until sentence, an accused person appears to be entitled to deal with his property as he will, as appears also from the words of sect. 10.

Under sect. 9, the Crown may appoint administrators of any convict's property. Sect. 10 provides as follows :—

Sect. 10. "Upon the appointment of any such administrator in manner aforesaid all the real and personal property, including choses in actions, to which the convict named in such appointment was at the time of his conviction, or shall afterwards while he shall continue subject to the operations of this Act, become or be entitled, shall vest in such administrator for all the estate, and interest of such convict therein."

Sect. 12 enacts that :—

"The administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit."

And the Act goes on to vest in the administrator extensive powers of management. Provision is also made for the appointment of an interim curator with limited powers pending the appointment of an administrator.

The property of the convict is to be preserved for him, and is to revert to him or to his representatives on the completion of his sentence, his pardon, or his death; and the administrator and the interim curator may be made accountable either before or after the reverting of the property to the convict. The property which comes within the definition contained in sect. 10 remains divested from the convict, even though he be lawfully at large; but as regards

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any property which he may acquire while lawfully at large, it is enacted by sect. 30 as follows :—

Property of convict acquired while lawfully at large not to be subject to the operation of this Act.

"No property acquired by a convict during the time which he shall be lawfully at large under any license shall vest in any administrator appointed under this Act, but such convict shall be entitled thereto without any interference on the part of any administrator or interim curator appointed under this Act, and during the time last aforesaid the disabilities mentioned in the eighth section of this Act, shall, as to such convict, be suspended."

Persons holding a fiduciary position incompetent to purchase.

Purchases by Persons holding Fiduciary Positions.] —It is a general rule of equity which attaches to all persons clothed with a fiduciary character, that they shall not become the buyers of the property of which, by virtue of the trust, they are themselves the vendors, or, in other words, to sell to themselves. The rule applies not only to trustees, strictly so called, but also to mortgagees with a power of sale, solicitors, agents, and all other persons "who by being employed or concerned in the affairs of another, have acquired a knowledge of his property:" Sugd. Vend. & Pur. 688 (*q*). The

(*q*) The rule extends to cases where the fiduciary relation is not created by any written instrument or express contract, but arises by implication from the conduct of the parties: *Tate* v. *Williamson*, L. R. 2 Ch. 56.

The principle underlying the rule stated in the text is of very extensive application. Thus, it is well settled that a trustee of renewable leaseholds may not renew for his own benefit, even though the lessor refuses to renew for the benefit of the *cestui que trust:* if the trustee renews at all, he will hold the renewed term as trustee: *Keech* v. *Sanford*, Sel. Ca. Ch. 61; 1 Wh. & Tud. L. C. 46; *Fitzgibbon* v. *Scanlan*, 1 Dow. 261; *Mill* v. *Hill*, 3 H. L. C. 828; and compare *Griffin* v. *Griffin*, 1 Sch. & L. 352; *Blewitt* v. *Millett*, 7 Br. P. C. 367, and *Acheson* v. *Fair*, 3 Dr. & W. 512. On similar grounds and in a similar manner the Court has dealt with renewals of leases by partners: *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Clegg* v. *Fisherwick*, 1 Mac. & G. 294; *Clement* v. *Hall*, 2 D. & G. 173; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; with renewals by executor *de son tort: Griffin* v. *Griffin*, 1 Sch. & L. 352; *Muloany* v. *Dillon*, 1 Ba. & B. 409; with renewals by tenants for life: *Pickering* v. *Vowles*, 2 Br. C. C. 197; *James* v. *Dean*, 11 Ves. 383, 15 Ves. 236; *Giddings* v. *Giddings*, 3 Russ. 241; *Eyre* v. *Dolphin*, 2 Ba. & B. 290; *Re Lord Ranelagh's Will*, 26 Ch. D. 590; *Phillips* v. *Phillips*, 29 Ch. D. 673; by mortgagees: *Rakestraw* v. *Brewer*, 2 P. Wms. 510; *Nesbitt* v. *Tredennick*, 1 Ball & &

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propriety of the rule is obvious. Nothing could be more dangerous than to permit trustees to place themselves in a situation in which their own personal interest is in direct variance with the duties of their office. As sellers, it is their duty, on behalf of those whom they represent, to obtain as large a price as possible; as purchasers, it is their interest to buy at the lowest price. To prevent, therefore, this conflict of duty and interest, the general doctrine in question declares that, though the full value may have been given for the estate, and the sale may have been made by public auction, and conducted with the utmost publicity and fair-

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B. 29: nor may a person employed as an agent to negotiate a loan take a lease to himself: *Taylor* v. *Salmon*, 4 My. & C. 134.

The general rule operates in many directions. For example, it requires agents who, in the course of the execution of the duties imposed upon them by their agency, make a profit, to account for that profit to their principal: *East India Co.* v. *Henchman*, 1 Ves. jun. 287; *Moxon* v. *Bright*, L. R. 4 Ch. 292; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Parker* v. *McKenna*, L. R. 10 Ch. 96; *Hay's Case*, L. R. 10 Ch. 593. So, an agent for sale, selling to himself, is accountable for any profit made: *Dunne* v. *English*, L. R. 18 Eq. 524; *De Bussche* v. *Alt*, 8 Ch. D. 286; and an agent for purchase, purchasing from himself, is similarly accountable: *Henchman* v. *East India Co.*, 8 Br. P. C. 85; *Gillett* v. *Peppercorne*, 3 Beav. 78; *Bentley* v. *Craven*, 18 Beav. 75; *Benson* v. *Heathorn*, 1 Y. & C. C. 326; *Burton* v. *Wookey*, 6 Mad. 368; *Kimber* v. *Barber*, L. R. 8 Ch. 56. In the same way an agent may not stipulate for any profit for himself: *Fawcett* v. *Whitehorn*, 1 Russ. & M. 132; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Waters* v. *Earl of Shaftesbury*, L. R. 2 Ch. A. 231. The principle applies *à fortiori* to the case of solicitors and confidential advisers: *Tyrrell* v. *Bank of London*, 10 H. L. C. 26; *Carter* v. *Palmer*, 1 Dr. & W. 722; *S. C.*, in Dom. Proc. 8 Cl. & F. 657; *Tate* v. *Williamson*, L. R. 2 Ch. A. 55. And in many recent cases it has been held that the promoters and directors of public companies are, under certain circumstances, trustees, who are bound either to make full disclosure of all necessary facts, or to account for profits: *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73; affirmed, 3 App. Ca. 1218; *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918; *Liquidators of Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. L. 189; *Parker* v. *McKenna*, L. R. 10 Ch. 96; *Panama and South Pacific Telegraph Co.* v. *India Rubber, &c., Telegraph Works Co.*, L. R. 10 Ch. 515; *Re Ambrose Lake Tin and Copper Mining Co.*, 14 Ch. D. 390; *Re Cape Breton Co.*, 26 Ch. D. 221.

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ness, yet a purchase by a trustee for himself, cannot stand: *Downes* v. *Grazebrook*, 3 Mer. 200.

Application of the rule; purchase of trust property by trustee.

The rule applies in the strongest and plainest manner to cases of purchases by sole trustees; for the *cestui que trust* is in that case entirely without protection. But even when there is room for contending that there has been protection for the *cestui que trust* in some form or other, the purchase, as a general rule, is liable to be set aside. The principle in question has been applied, as well where the purchase was made by one of several trustees (the other trustees interfering in the sale), as where the purchaser was the only, or the only acting trustee. Thus, in *Whelpdale* v. *Cookson*, 1 Ves. sen. 9 (more fully stated Belt's Supp. 9), where lands devised in trust for sale, for payment of debts, were put up to auction by the trustees, a person bidding on behalf of one of the trustees was declared the purchaser, and the property was conveyed by the trustees to him. He afterwards conveyed to the trustee for whom he made the purchase; but it was held, that the purchase could not stand (*r*). It appeared in this case, that the trustee had expended monies in improvements, and Lord *Hardwicke* directed that he should be reimbursed these monies, and his purchase-money, with interest at 4 per cent.

So, in *Whichcote* v. *Lawrence*, 3 Ves. 740, Lord *Rosslyn*, at the instance of creditors, set aside a purchase made by one of five trustees for sale, for payment of debts: in this case the sale was by auction, at which several of the trustees attended; the purchasing trustee, six years afterwards, resold at a great profit, and he was decreed to account for this profit to the creditors. But the circumstance, that there are other trustees, will weigh, in connexion with other facts, in favour of the transaction, where the purchase is made by trustee from *cestui que trust*,

(*r*) The decree directed that if a majority of the creditors elected to have the premises put up to sale again they should be re-sold; but see *Ex parte Lucy*, 6 Ves. 625, 628, 630, n., where Lord *Eldon* intimated an opinion, that the majority of the creditors could not in such a case bind the minority.

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a mode of dealing which, as will be seen, is not necessarily invalid : *Morse* v. *Royal*, 12 Ves. 374.

Again, in *Campbell* v. *Walker*, 5 Ves. 678, Sir *R. P. Arden*, M.R., decreed a purchase at a sale by auction on behalf of one of two devisees in trust for sale, to be void, though it appeared that the sale was fair and open, had been duly advertised, and there were several bidders, and it was declared immediately afterwards who was the purchaser, though the biddings at the time were not avowedly made on his behalf. It was proved that the trustees had endeavoured to prevail on the tenant of the principal estate to purchase it, and at a previous sale had bought it in at a price less than that which the purchasing trustee gave for it. The costs were subsequently given against the trustee : *Sanderson* v. *Walker*, 13 Ves. 601. In this case the Master of the Rolls laid down the rule broadly, that no trustee could, in any case, purchase without being liable to have the sale opened by the *cestui que trust*, unless the purchase were made under the sanction of the Court, which, he observed, would give permission for the trustee to purchase, if the interest of the *cestui que trust* required it ; but not without the concurrence of the *cestui que trust*, if they are themselves competent to give permission : *Ex parte James*, 8 Ves. 552. In exact consistency with the principle of the preceding cases, it has been held a valid objection to a title of part of the glebe-lands of a rectory, which had been sold by the rector under the power in the Act for the redemption of the land-tax (*s*), that the rector himself was the real purchaser : *Grover* v. *Hugell*, 3 Russ. 428.

A trustee, purchasing at a sale by the Court (except by express permission), will not find that the validity of his purchase is thereby increased : *Price* v. *Byrn*, cit. 5 Ves. 681 ; *Cary* v. *Cary*, 2 Sch. & Lef. 173. Nor is it sufficient that the parties should have had independent professional advice, if the trustee or other person standing in a fiduciary

(*s*) *Vide* stat. 42 Geo. 3, c. 116, s. 79.

relation has concealed any material fact with which, by reason of his position, he has become acquainted: *Tate* v. *Williamson*, L. R. 2 Ch. 56.

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A person who has filled a position which would bring a purchase by him within this rule, does not become capable of making a valid purchase merely by vacating his office: *Ex parte James*, 8 Ves. 352; *Carter* v. *Palmer*, 8 Cl. & F. 657; *Ex parte Baynton*, 7 Jur. 244; *Spring* v. *Pride*, 10 Jur. N. S. 646. But in *Ex parte Perkes*, 3 M. D. & De G. 385, the solicitor to a fiat in bankruptcy was removed on his own application, in order that he might be able to bid at the sale.

As to purchases by trustees who have only a dry legal estate.

But the objection to a purchase by a trustee loses its force where he is not a trustee for sale, but is simply the owner of a dry legal estate. In such a case the proposition, that a trustee cannot sell to himself, or in other words that he cannot exercise the functions of his office for his own benefit, has no application, the disposition of the property being not within the scope of those functions.

An attempt was made to open a purchase by a trustee of this description in *Parkes* v. *White*, 11 Ves. 209. In that case the trustee was the trustee to support the contingent remainders after a life estate under a marriage settlement, and purchased the whole fee, and the Court decreed that the remainder in fee expectant on the death of the tenant for life should be conveyed to new trustees upon the trusts of the settlement; but the decree did not disturb the purchase as to the estate for life. So a purchase by a person who was trustee for another in fee, has been upheld: *Pooley* v. *Quilter*, 4 Drew, 189; see also *Denton* v. *Downer*, 23 Beav. 289. In *Hickley* v. *Hickley*, 2 Ch. D. 190, a sale by a trustee for sale under a will to the trustees of his own marriage settlement, under which he took a partial interest, was upheld. But see *Plowright* v. *Lambert*, 52 L. T. 646.

Disclaiming or renouncing trustee.

But the mere fact that a person has been appointed a trustee does affect him with incapacity in this respect if he has not acted, or has refused to act in the trust: *Stacey* v. *Elph*, 1 My. & K. 195; or

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if he has renounced: *Mackintosh* v. *Barber*, 1 Bing. 50. See also *Clark* v. *Clark*, 9 App. Ca. 733. Nor does the rule apply to an executor who has not proved: *Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693; and as to the position of administrators, see *Re Worsam, Hemery* v. *Worsam*, 51 L. J. Ch. 469.

Confirmation by *cestui que trust* of purchase by trustee.

Purchases of this nature are of course capable of confirmation by the person whose interests are prejudicially affected, no matter how advantageous to the purchaser the transaction may have been: *Barcock* v. *Barcock*, 34 Beav. 371. But in order that a confirmation, whether express or implied, may have effect, it is necessary that the confirming party should be *sui juris*, and aware of the facts of the case, and of his rights. No confirmation can be valid where the *cestui que trust* is still under disability: *Campbell* v. *Walker*, 5 Ves. 678; *Randall* v. *Errington*, 10 Ves. 423; *Morse* v. *Royal*, 12 Ves. 373; nor can it avail when the confirming party was not aware of the actual state of the case, *i.e.*, that the trustee had purchased, and that his purchase was improper: *Chalmer* v. *Bradley*, 1 Jac. & W. 51; *Charter* v. *Trevelyan*, 11 Cl. & F. 714.

Effect of acquiescence.

Length of time, it seems, is no bar to the remedy of the *cestui que trust*, unless it be proved that he was acquainted with the fact of the purchase having been made by the trustee: *Randall* v. *Errington*, 10 Ves. 423; *Life Association of Scotland* v. *Siddall*, 7 Jur. N. S. 785; 3 De G., F. & J. 58. In the case of *York Buildings Co.* v. *M'Kenzie*, 8 B. P. C. (Toml. ed.) 42, the sale was set aside after an interval of eleven years; but, in *Gregory* v. *Gregory*, Jac. 621, Sir *W. Grant*, refused to interfere, on account of eighteen years having been suffered to elapse, after disabilities removed, before the filing of the bill. See also *Chalmer* v. *Bradley*, 1 Jac. & W. 59; *Roche* v. *O'Brien*, 1 Ba. & B. 330; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Webb* v. *Rorke*, 2 Sch. & Lef. 672; *Oliver* v. *Court*, Dan. 301; *Purcell* v. *Kelly*, Beat. 492; *Harcourt* v. *White*, 28 Beav. 303; *Barwell* v. *Barwell*, 34 Beav. 375; *Seagram* v. *Knight*, L. R. 2 Ch. 628; and when there are other facts besides the

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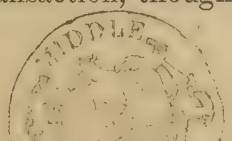
mere lapse of time to show that there has been acquiescence, a still shorter time will be held to destroy the right to reopen the sale : *Wright* v. *Vanderplank*, 2 K. & J. 1 ; 8 De G., M. & G. 133. In *Molony* v. *L'Estrange*, Beat. 406, a purchase of an annuity, by an attorney, from his client, was set aside at the suit of the heir after thirty years' acquiescence by the client, in ignorance of his right to resist the payment ; but, under the circumstances, no account was directed against the attorney's representatives. In another case, a purchase by an executor of canal shares, the property of the testator, was set aside after a period of sixteen years, on the ground that the purchase was made under circumstances of concealment : *Watson* v. *Toone*, 6 Madd. 153. As to delay in impeaching the sale of a reversion, see *Whalley* v. *Whalley*, 3 Bligh, 1 ; *Gowland* v. *De Faria*, 17 Ves. 20 ; *Duke of Leeds* v. *Lord Amherst*, 2 Phill. 47 ; *Bennett* v. *Colley*, 5 Sim. 181 ; 12 M. & K. 225 ; *Hope* v. *Liddell*, 21 Beav. 183 ; and as to subsequent confirmation of the sale by the *cestui que trust*, see *Morse* v. *Royal*, 12 Ves. 373 ; *Clarke* v. *Swaile*, 2 Eden, 134 ; *Cocknell* v. *Cholmeley*, 1 Russ. & M. 425 ; *Murray* v. *Palmer*, 3 Sch. & L. 486 ; *Chalmer* v. *Bradley*, 1 J. & W. 51 ; *Medlicot* v. *O'Donnell*, 1 Ba. & B. 156 ; *Salmon* v. *Cutts*, 4 De G. & S. 125; *Great Luxembourg Rail. Co.* v. *Magnay*, 25 Beav. 586 ; *Scottowe* v. *Williams*, 3 De G., F. & J. 533.

Colourable sale to a third person unavailing.

The scheme of conveying the property to a third person as the apparent purchaser, and for such person immediately, or after a decent interval, to convey to the trustee, for a pecuniary consideration, generally the same as that which was given by the nominal purchaser, has frequently been unsuccessfully tried. Thus, in the case of *Cook* v. *Collingridge* (Jac. 607), where the executors of a trader sold his share in a partnership trade to the surviving partners, for a sum which had been fixed as its value by two appraisers, one chosen on each side ; and the next day the surviving partners for the same sum assigned the share to one of the executors : inasmuch as the transaction, though fair, was evi-



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dently from the first a sale to the executor, Lord *Eldon* set aside the sale. The attempt to disguise the transaction by a feigned sale to a third person always gives to it a complexion much less favourable than if the sale had been open: *Gregory* v. *Gregory*, Jac. 621. See also *Parkes* v. *White*, 11 Ves. 209; *Grover* v. *Hugell*, 3 Russ. 428; *Woodhouse* v. *Meredith*, 1 J. & W. 204. The circumstance of the purchase being made by the trustee for his children, of course, does not protect it: *Huguenin* v. *Baseley*, 14 Ves. 289; *Gregory* v. *Gregory*, Jac. 621.

Making purchase for third persons.

Trustee held to a purchase if disadvantageous to him.

It should be observed that the rule vacating purchases by a trustee is never applied, except at the option or for the benefit of the *cestui que trust*, and cannot be taken advantage of by the trustee himself, in order to get rid of a bad bargain. If the contract is a disadvantageous one, he will be held to it; if beneficial, the benefit will be taken from him. The rule is, to put the estate up for sale at the price which the trustee gave, with the addition of moneys expended, if any, in substantial improvements; and if a larger sum is bid than such aggregate amount, the property is sold for the benefit of the *cestui que trust;* if not, the trustee retains it: *Ex parte Lacey*, 6 Ves. 625; *Ex parte Reynolds*, 5 Ves. 707; *Lister* v. *Lister*, 6 Ves. 631; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Robinson* v. *Ridley*, 6 Madd. 2; *Ex parte Hewit*, 2 Mon. & A. 477. So a trustee for sale taking a lease from his co-trustees, will be held to it or not, at the option of the *cestui que trust: Ex parte Hughes*, 6 Ves. 617; *Att.-Gen.* v. *Clarendon*, 17 Ves. 491; *Att.-Gen.* v. *Corporation of Cashel*, 3 Dru. & W. 294. But a client who impeaches a sale to him from his solicitor, cannot retain the subject-matter at a valuation: *Driscoll* v. *Bromley*, *post*, p. 111.

Purchase by assignee of bankrupt, set aside.

In *Ex parte Reynolds*, 5 Ves. 707, Lord *Eldon* removed assignees, on account of one of them having purchased the bankrupt's estate. In *Ex parte Morgan*, 12 Ves. 6, where an assignee purchased part of the bankrupt's estate, at a sale by auction, and afterwards sold it at a profit of 250*l.*, Lord *Erskine* held him to be a trustee for this sum; in

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the first instance for an equitable mortgagee, who gave up the deeds upon the first sale, but whose debt had not been wholly satisfied out of the purchase-money, and next for the general creditors. In *Ex parte Bennett*, 10 Ves. 381, Lord *Eldon* observed, that the rule against purchase by trustees applied to assignees in bankruptcy with more force than to any other description of trustees, there being more temptation to acquiescence on the part of the creditors: see also *Turner* v. *Trelawnay*, 12 Sim. 49; *Pooley* v. *Quilter*, 2 De G. & J. 327; *Ex parte Burnell*, 7 Jur. 116.

The proper course for a trustee in bankruptcy, who wishes to purchase, is to obtain the previous consent of the creditors, at a meeting convened for the purpose, and then, if the trustee makes an offer which is clearly beneficial to the estate, it seems that an order permitting the sale will be granted: *Anon.*, 2 Russ. 350; *Ex parte Gore*, 3 M. D. & De G. 77; or he may, on his own application, be removed in order that he may bid: *Ex parte Perkes*, 4 M. D. & De G. 385; but compare *Ex parte Holyman*, 8 Jur. 156. But if he purchase without leave, the Court will not confirm the sale, though the creditors may have subsequently consented: *Ex parte Thwaites*, 1 Mon. & A. 323.

Trustee not precluded from buying of *cestui que trust*.

The rule, it has often been observed, is not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself, and thereby be enabled to make use of the information acquired by him in the character of trustee, for his own benefit. He is not, however, precluded from dealing with the *cestui que trust*, if the latter choose to regard the relation of trustee and *cestui que trust* as dissolved, and to treat with him in a distinct character.

Case of *Coles* v. *Trecothick*.

Thus, in the case of *Coles* v. *Trecothick*, 9 Ves. 234 (which is a leading case on the doctrine under discussion), A. proposed to convey all his estates at B., to C. and D., in trust to sell for the payment of his debts. No conveyance was executed, but preparations were made for the sale, and the estates were, with the approbation of the trustees, surveyed and valued by S., an auctioneer, under the sole

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direction of A., who fixed the minimum price at which the estate was to be sold. There being no bidder, the estate was divided into lots, and again offered for sale, still under the exclusive management of A., the trustees not interfering; and part of the property was ultimately bought by the trustee, C., on behalf of his father. A bill being filed to enforce the performance of the contract, Lord *Eldon* was of opinion, that this being a *bonâ fide* sale by a *cestui que trust*, taking the whole execution of the trust upon himself, making surveys, settling the places, modes of sale, and prices, and with all the knowledge as to the value which the trustees possessed, constituted a case of exception to the general principle; and, therefore, decreed the specific performance of the contract. See *Clarke* v. *Swaile*, 2 Eden, 134 (where the purchase was made by the trustee, at the urgent instance of the *cestui que trust*): *Morse* v. *Royal*, 12 Ves. 375.

Trustees incapable of acting as agents for purchasers.

In *Coles* v. *Trecothick*, 9 Ves. 234, it will be observed, the trustee purchased as agent for his father, and not for himself. But Lord *Eldon* considered that this made no difference, for a trustee was under the same disability to contract as the agent of another as for himself. So, in the previous case of *Twining* v. *Morrice*, 2 Br. C. C. 326, *Kenyon*, M. R., refused the specific performance of a contract for purchase, because the agent of the vendors, who were executors, was concerned as agent for the purchaser in bidding for the estate; nor can a trustee separately employ an agent to purchase for a third person: *Hesse* v. *Briant*, 6 De G., M. & G. 623. Upon the same principle, Lord *Eldon*, in *Ex parte Bennett*, 10 Ves. 381, set aside a purchase of part of a bankrupt's estate, because the solicitor to the commission acted as the agent of the purchaser in bidding for the estate. See also *Downes* v. *Grazebrook*, 3 Mer. 209; *Ex parte Grylls*, 2 Dea. & C. 290; *Whitcomb* v. *Minchin*, 5 Madd. 91; and in *Orme* v. *Wright*, at the Rolls, December 4, 1838, a sale by a mortgagor to his brother-in-law, who had acted in some respects as the agent of the mortgagee in viewing the security and paying the

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money, was set aside, under a combination of circumstances, of which, perhaps, no one singly would have sufficed to vitiate the transaction. And in another case, a purchase of a mortgaged estate from the trustee for sale, by a person who had, on various occasions, with the knowledge of the trustee, acted as agent for, and managed the affairs of, the mortgagor, was set aside: *Edgecumbe* v. *Stranger*, at the Rolls, May 31, 1837, MS. It may be observed, that an agent, employed to purchase an estate, cannot purchase for himself: *Lees* v. *Nuttall*, 2 My. & K. 819.

Where *cestui que trust* sells, there must be no concealment on the part of the purchasing trustee.

But even where the purchase is made from the *cestui que trust*, it is essential to support the transaction, that there should be (according to Lord *Eldon's* own words, 9 Ves. 247) "no fraud, no concealment, no advantage taken, by the trustee, of information acquired by him in the character of trustee;" and the non-disclosure of the fact of the purchase being made on behalf of the trustee, would unquestionably be a ground for setting it aside: *Randall* v. *Errington*, 10 Ves. 427; *Kilbee* v. *Sneyd*, 2 Moll. 214. See also *Denton* v. *Donner*, 23 Beav. 285; *Luff* v. *Lord*, 34 Beav. 220; *Mockerjee* v. *Mockerjee*, 2 Ind. App. 18.

In *Fox* v. *Mackreth*, 2 Br. C. C. 400 (where the general doctrine underwent much discussion), Sir *R. P. Arden*, M.R., set aside a purchase which had been made by a person to whom the estates in question had been conveyed jointly with another person, in trust for sale, for paying debts and redeeming certain annuities (the trustee himself being also a mortgagee); though the contract was entered into by the owner himself, and after much discussion of the terms, his honour being of opinion that undue advantage had been taken of the confidence placed in the trustee. And this decree was affirmed by Lord *Thurlow*, C., and afterwards by the House of Lords. In this case the trustee had, in the interval between the contract and the conveyance, resold the property at a profit of upwards of 10,000*l.*, and he was held to be a trustee for the mortgagor in respect of this sum. The general principle here stated does

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not apply to the case of a mortgagor and mortgagee, and it is settled that a mortgagee may, as a general rule, purchase the equity of redemption from his mortgagor: *Knight* v. *Marjoribanks*, 11 Beav. 322; 2 Mac. & G. 10; but a mortgagee selling under his power of sale is under the same disability to purchase the mortgaged estate himself that attaches to other persons clothed with a fiduciary character; and see *ante*, Vol. III., sub tit. MORTGAGES, pp. 928, 929.

Circumstance of profit having been made, not requisite to impeach a purchase by a trustee.

In *Whichcote* v. *Lawrence*, 3 Ves. 750, Lord *Rosslyn* appears to have founded his determination on the circumstance of profit having been subsequently made by the trustees; but, in later cases, the general rule has been placed upon a broader basis, and has been unsparingly applied at the option of the *cestui que trust*, whenever the union of the character of buyer and seller in the same person could be proved, without regard to the fact of the bargain being fair or unfair, advantageous or disadvantageous; and, besides, the circumstance that a profit has been made by the trustee on a subsequent sale, proves nothing as to the unfairness of the original bargain (though it generally forms the motive for attempting to impeach it), since the estate may have risen in value, or a purchaser may have been found who would give an extraordinary price, *pretium affectionis*. On the other hand, the fact that the purchase has not proved to be advantageous to the trustee, is equally inconclusive as evidence of the full value having been given, as he may have sold it at an under-value, or the property may, in the interval, have become depreciated. In short, to refer again to the language of Lord *Eldon*, in *Ex parte Lacey*, 2 Ves. 627, "whether the trustee makes advantage or not, if the connection (between him and the *cestui que trust*) does not satisfactorily appear to have been dissolved (*t*), before the contract is entered into, it is in the choice of the *cestuis que trust*, whether they will

(*t*) By this his lordship must not be understood to mean, not a formal or technical renunciation of the trust, but a substantial and virtual abandonment of the fiduciary character.

take back the property or not." The rule applies not only to the trustee himself, but also to any person appointed by him as an agent to conduct the sale: *Whitcomb* v. *Minchin*, 5 Madd. 91; *Re Bloye's Trust*, 1 Mac. & G. 488.

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But the Court, we have seen, will allow the trustee monies expended in substantial improvements: *Whelpdale* v. *Cookson*, 1 Ves. sen. 9; Belt's Supp. 9 (see this case quoted from Reg. Lib. 5 Ves. 682); *Ex parte Hughes*, 6 Ves. 617; *Ex parte James*, 8 Ves. 352; *Ex parte Hewit*, 2 Mon. & A. 477; but see *Kenney* v. *Browne*, 3 Ridg. P. C. 462; *Baugh* v. *Price*, 1 G. Wils. 320; *Hall* v. *Hallett*, 1 Cox, 134; *Campbell* v. *Walker*, 5 Ves. 682; *Dacry* v. *Durrant*, 1 De G. & J. 335; *Olive* v. *Court*, 8 Pri. 172; *Stratton* v. *Murphy*, 1 Ir. R. Eq. 361, as to improvements, where the trustee has been guilty of fraud. And this expenditure, in the case of the *York Buildings Co.* v. *M'Kenzie*, 8 Br. P. C. (Toml. ed.) 42, comprised the erection of a mansion-house and other costly improvements. In estimating the improvements, old buildings pulled down, if incapable of repair, are to be valued as old materials; but otherwise, as buildings standing: *Robinson* v. *Ridley*, 6 Madd. 2. On the other hand, the trustee will be charged with the consequences of acts that deteriorate the value of the estate: *Ex parte Bennett*, 10 Ves. 381.

Trustee allowed monies expended in substantial improvements.

We have seen that, where a trustee has made a purchase which the Court will not permit to stand, it will consider him as still holding the property in trust for the parties beneficially entitled, or, if he has sold again to advantage, will give to those parties the benefit arising from the second sale; and, commonly, the object of the persons impeaching the sale has been simply to recover against the trustee the profit so made, leaving the purchaser's enjoyment untouched. It is in the option, however, of the *cestui que trust*, in such cases, to proceed for the recovery of the estate itself, if it has fallen into the hands of a purchaser with notice of the trustee's purchase, and such notice will always be contained in the deeds of conveyance, if they truly repre-

Purchasers claiming under trustees who have purchased, how far chargeable.

Purchases by Persons in Fiduciary Positions.

sent the transaction: *Att.-Gen.* v. *Lord Dudley,* G. Coop. 146. In *Randall* v. *Errington,* 10 Ves. 423, a purchaser from the trustee was made defendant; but, as the case was not pressed against him, it is probable that notice could not be proved. See also *Parkes* v. *White,* 11 Ves. 209; *Dunbar* v. *Tredennick,* 2 Ball. & B. 304; and see *York Buildings Co.* v. *M'Kenzie,* 8 B. P. C. 42, as to leases, &c., by the trustee-purchaser.

Cestui que trust recovering the property, must return principal money received and interest.

Where a person claims to recover an estate which has been sold to a trustee, he must repay the sum he has received, with interest, which seems in some instances to have been at the rate of 4 per cent.: *Whelpdale* v. *Cookson,* 1 Ves. sen. 9; and in others 5 per cent.: *Cook* v. *Collingridge,* Jac. 607; see also *Donovan* v. *Fricker,* Jac. 165; *Watson* v. *Toone,* 6 Madd. 153; *Ex parte James,* 8 Ves. 351; *Hall* v. *Hallett,* 1 Cox, 134; *York Buildings Co.* v. *M'Kenzie,* 8 Br. P. C. 42. And it should seem that if the property has been in the actual occupation of the defendant, an occupation rent will be set upon it, and annual rents will be made, thereby giving the *cestui que trust* interest on the excess of the rent above the interest; though it seems doubtful whether interest would be allowed on the entire rent, when its excess from time to time had wholly liquidated the principal, so that there was nothing to set off against it: *Donovan* v. *Fricker,* Jac. 165; *Ex parte James,* 8 Ves. 351. The former case was an instance of an alleged purchase made by a stranger, which was set aside for fraud, and not a purchase by a trustee; but the principle seems to be the same. The trustee-purchaser must, of course, account for all profit arising from the estate: *Ex parte James,* 8 Ves. 351; *Ex parte Lacey,* 6 Ves. 630; *Watson* v. *Toone,* 6 Madd. 153; though he will not be charged with interest thereon: *Macartney* v. *Blackwood,* Ir. T. R. 602.

Incapacity to purchase extends to all persons confidentially concerned for the vendor.

It remains to be observed, that the incapacity to purchase extends to every person clothed with a confidential character, and whose duty requires him to effect as advantageous a sale as possible.

Thus purchases by executors or administrators of the personal estate of a deceased person have re-

peatedly been set aside: *Watson* v. *Toone*, 6 Madd. 153; *Baker* v. *Read*, 18 Beav. 398; *Smedley* v. *Varley*, 358. So also purchases by guardians from their wards, immediately on their coming of age, and that without reference to the adequacy of the consideration: *Oldin* v. *Sambourne*, 2 Atk. 15; *Dawson* v. *Massey*, 1 Ba. & B. 219; see Sugd. V. & P. 691. **Purchases by Persons in Fiduciary Positions.**

In the case of the *York Buildings Co.* v. *M'Kenzie*, 8 Br. P. C. (Toml. ed.) 42 (which has always been considered a leading case), a purchase was set aside, which had been made by a common agent or solicitor in Court in Scotland, of estates of an insolvent company, sold by the Court of Session under the authority of general statutes and a special Act of Parliament, which purchase had been openly made at a public judicial auction. So, in *Crowe* v. *Ballard*, 3 Br. C. C. 120, where an agent employed to sell a reversionary legacy secretly purchased it himself, and had it assigned to a nominal purchaser, Lord *Thurlow* set aside the purchase. See also *Whitcomb* v. *Minchin*, 5 Madd. 91; *Hunter* v. *Atkins*, Coop. Cas. tem. Brougham, 464; *Re Bloye's Trust*, 1 Mac. & G. 488; *Martinson* v. *Clowes*, 21 Ch. D. 857. So also an auctioneer employed to sell property will not be allowed to purchase it: *Olive* v. *Court*, 8 Pri. 127; *Baskett* v. *Cafe*, 4 De G. & S. 388. Agent employed to sell.

Again, in *Ex parte James*, 8 Ves. 337, Lord *Eldon* decreed against a purchase made by the solicitor to a commission, of part of the bankrupt's estate, though it was made publicly at an auction, at which many of the creditors were present and urged him to bid, and his lordship expressed his conviction of the moral propriety of the transaction. See also *Ex parte Bennett*, 10 Ves. 381; *Ex parte Farley*, 3 Dea. & C. 110; *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500. Solicitor to a bankrupt's estate.

But (in conformity to the rule already stated with regard to trustees) a solicitor, who has improperly purchased an estate which he was professionally employed to sell, cannot himself avoid the bargain; and in the case of *Nelthorpe* v. *Pennyman*, 14 Ves. 517, where, on a sale before the master, the solicitor Solicitor cannot himself repudiate purchase.

Purchases by Persons in Fiduciary Positions.

in the cause had purchased some lots to prevent a sale at an undervalue, Lord *Eldon* refused to discharge him from his contract, on being informed that there was no higher bidding; his lordship observing, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale, as the certain effect of a bidding by the solicitor in the cause is, that the sale is immediately chilled.

Sale by solicitor to client set aside.

In *Gibson* v. *Jeyes*, 6 Ves. 266, Lord *Eldon* set aside the sale of an annuity by a solicitor to his client, an infirm imbecile old lady, on the ground that his duty to her, under the circumstance of her situation, required that he should give her his most vigilant care and advice; and his own interest in this transaction was adverse to his discharge of that duty. See also *Wood* v. *Downes*, 18 Ves. 120; *Montesquieu* v. *Sandys*, id. 302; *Robinson* v. *Ridley*, 6 Madd. 2; *Lees* v. *Nuttall*, 1 Russ. & M. 53. In all the preceding cases except one, where advantage was taken of mental imbecility, the solicitor whose purchase was set aside, was professionally concerned in selling; and, therefore, they fell directly within the principle, which prohibits purchases by persons standing in the inconsistent relation of seller and buyer at one and the same time. So, in *Carter* v. *Palmer*, 8 Cl. & F. 657, a purchase at an undervalue by counsel who had advised on the title was set aside.

No general rule that an attorney cannot purchase from or sell to hi client.

But it is not to be inferred from these cases, that a solicitor is under any general incapacity to purchase from his client. Thus, in a case in the House of Lords (reversing a decree of the Irish Exchequer), the specific performance of a contract was decreed, which had been resisted on the ground that an attorney could not purchase from his client. Lord *Eldon*, however, thought that the purchaser was not concerned for the vendor in this instance, as his solicitor, so as to sustain the objection, if it was capable of being sustained, but his lordship declared that there was no such doctrine as that an attorney could not deal with his client. If the attorney were employed to sell, if he dealt for the property, he

must put an end to the confidential relation, or put himself completely at arm's length; or, if the contract was afterwards impugned, it would be incumbent upon him to show that he had made a reasonable use of that confidence, and had given as ample and correct advice to his client as he would have done if his client had been dealing with a third person. His lordship conceived also, that, if an attorney were employed as agent of a landed estate, he could not deal with the principal for that estate, without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent; and unless he did this, the contract, if questioned, could not be supported. But, independently of these particular circumstances, an attorney did not stand exactly in the situation of a trustee. The general rule, that a trustee to sell could not purchase the trust estate, was now pretty well settled, but there was no such rule with respect to an attorney. In this view of the case, Lord *Redesdale* concurred: *Cane* v. *Allen*, 2 Dowl. 289; see *Bellew* v. *Russell*, 1 Ba. & B. 104; *Champion* v. *Rigby*, 1 Russ. & M. 539; *Williams* v. *Llewellyn*, 2 Y. & J. 68; *Jones* v. *Thomas*, 2 Y. & C. 519. In another case, a solicitor who was employed to procure an investment of money, sold to his client ground-rents at eighteen years' purchase, for which he had himself given but fifteen years' purchase, and it appearing that the client was not informed of the price at which the solicitor had purchased, or of the fact that the solicitor was the seller, the transaction was set aside, but the Court refused to allow the purchaser to keep the rents at a valuation, or at the price given by his vendor: *Driscoll* v. *Bromley*, at the Rolls, May 9, 1837, MS.

Purchases by Persons in Fiduciary Positions.

A mortgagee exercising a power of sale cannot purchase the mortgaged property, either in his own name, or through an agent or trustee; *Robertson* v. *Norris*, 4 Jur. N. S. 443. Nor can an agent of the mortgagee who has been employed to value the property, or received the interest, purchase from the mortgagee on his own account: *Orme* v. *Wright*, 3 Jur. 19; *Re Bloye's Trust*, 1 Mac. & G. 488. The

Mortgagee with powers of sale.

Purchases by Persons in Fiduciary Positions.

rule, however, does not preclude a mortgagee from purchasing the equity of redemption from the mortgagor at a fair price: *Knight* v. *Marjoribanks*, 2 Mac. & G. 10. See also *Webb* v. *Rorke*, 2 Sch. & L. 661; *Dobson* v. *Land*, 8 Ha. 220; *Waters* v. *Groom*, 11 Cl. & F. 684. But if a mortgagee takes advantage of the embarrassed circumstances of the mortgagor in order to purchase the property under pressure at an undervalue, the sale will be liable to be set aside: *Ford* v. *Olden*, L. R. 3 Eq. 461. A puisne mortgagee is at liberty to purchase from the first mortgagee selling under his power: *Parkinson* v. *Hanbury*, 2 De G., J. & S. 450; *Kirkwood* v. *Thompson*, *ibid.* 613.

Creditor may purchase under his own execution.

And it has been decided, that a creditor suing out an execution is not incapacitated from purchasing property sold under it, as the sale is made by the sheriff, and not by the creditor: *Stratford* v. *Twynam*, Jac. 418.

Tenant for life.

Nor is a tenant for life, whose consent to the sale is requisite by the terms of a power, incompetent to purchase: *Howard* v. *Ducane*, Turn. & R. 81; *Bevan* v. *Habgood*, 1 J. & H. 222; *Dicconson* v. *Talbot*, L. R. 6 Ch. 32; nor a mortgage creditor who has an agreement by his debtor to execute a conveyance in trust for sale, but which conveyance has not been executed; *Chambers* v. *Waters*, 3 Sim. 42. And there is no rule of policy prohibiting a steward from taking a lease from his employer, if there has been no improper concealment of information acquired by him in that character: *Selsey* v. *Rhoades*, 2 Sim. & S. 41; 1 Bligh, N. S. 1. A partner cannot gain any advantage in purchasing his co-partner's share in the business, by any exclusive knowledge which he possesses of its value: *Maddeford* v. *Austwick*, 1 Sim. 89; 2 My. & K. 279.

Trustee may deal with other legatees, where his office gives him no advantage.

It should be noticed that the doctrine here discussed does not prevent a trustee, who has also a beneficial interest, from dealing with the other *cestui que trust* in regard to such interest, the matter being of such a nature that his office gives him no advantage over the other contracting party; and, therefore, where trustees, who were also residuary

Purchases by Persons in Fiduciary Positions.

legatees, entered into an arrangement with an annuity-legatee respecting his claim to have a fund invested in a particular species of security, in relation to which the will was ambiguous, and all the parties were fully aware of their rights, Sir *J. Leach*, V.-C., refused to disturb the arrangement; his Honour observing that the dealing was in the character of residuary legatee, and it was impossible he could derive any advantage from the character of executor: *Naylor* v. *Winch*, 1 S. & S. 555.

Disability to purchase depending on statute or public policy.

In addition to the incapacity to purchase which attaches to persons holding a fiduciary position there are certain cases in which public policy or the statute law intervenes to invalidate purchases. In these cases the purchase cannot be supported at all, but falls entirely to the ground; though the purchaser is entitled to be recouped on the same basis as in the cases which have been considered in the preceding pages.

The General Inclosure Act (41 Geo. 3, c. 100) forbids commissioners acting thereunder to purchase any land at all within a parish in respect of which an inclosure is made, until there has elapsed a period of five years from the date of the execution of the award.

Similarly the Commons Inclosure Act (8 & 9 Vict. c. 118, s. 120) lays a like disability upon valuers acting under its provisions for a term of seven years.

In some cases the disability arises from obvious considerations of public policy. Thus a bishop, whose consent is necessary to a charge of an annuity upon a rectory, may not himself purchase it, though he give a larger price than any one else would: *Greenlaw* v. *King*, 34 Beav. 49; an arbitrator may not purchase claims of parties to the arbitration, before such claims have been determined by him: *Blennerhassett* v. *Day*, 2 Ba. & B. at p. 116.

CHAPTER III.

THE FORMAL PARTS OF PURCHASE DEEDS.

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1. Commencement of Purchase Deeds.

Formal Parts of Purchase Deeds.

Conveyances by deed.

Freehold lands and equitable estates in copyholds are conveyed by deed; but legal estates in copyholds pass by means of surrender and admission. Assignments of leaseholds and other personal property (when such personal property either is not actually delivered, or does not pass by forms specially required by law) are also effected by deeds, similar to those by which freehold land is conveyed.

It is therefore proposed in the present chapter to explain the mode usually adopted for framing purchase deeds of freeholds, and to indicate the way in

which such deeds are ordinarily made available for the conveyance of leaseholds and personal property, generally, reserving to subsequent chapters the consideration of the methods of conveying copyholds and such other kinds of property as require special treatment.

Formal Parts of Purchase Deeds.

The Introductory Words of a Conveyance.]—Where the conveyance is made between two or more parties, the instrument is called an indenture, and commences with the words "This Indenture;" but where the instrument is made by one party only, it is a deed poll. It is sometimes said that the introductory words of an indenture should vary according as it contains, or does not contain, recitals; and that in the first case it should begin "An Indenture;" but in the second "This Indenture." This distinction is not, however, generally observed in practice. In the case of deeds poll, however, there is a well known rule that, if the instrument does not contain recitals, the proper introductory words are, "Know all men by these presents that I [*the grantor*], of, &c.," but that if it does contain recitals, it should begin, "To all to whom these presents shall come [*the grantor*], of, &c., sends greeting, whereas, &c." These observations apply to all instruments of conveyance except those which deal with the legal estate in copyhold land, which, as has been observed, differ entirely from those by which freehold land and personal estate and interests therein are conveyed.

Introductory words.

The Date.]—In indentures, the words of introduction are immediately followed by a statement of the date of the deed. The date to be inserted is that on which the instrument is executed by the grantor, or the first of the granting parties who executes it (*a*). Where, in carrying out one trans-

The date in indentures.

(*a*) Where a deed has to be executed by several conveying parties, it will be considered as one entire transaction, operating as to the different parties to it, from the time of its execution by each, but not perfect till the execution by all the conveying parties: *Doe* d. *Lewis* v. *Bingham*, 4 B. & Al. at p. 675. But a

Formal Parts of Purchase Deeds.

action, two deeds are needed, as, for instance, where an outstanding estate is conveyed to the grantor by an independent deed, and subsequently he conveys all his interest, both instruments may be, in fact, executed on the same day, but the former may be dated the day before its actual execution, or, if dated the same day, will be referred to in the recitals of the latter deed as having been executed "on the same day as, but before the execution of, these presents."

From what date a deed operates.

A deed, generally speaking, takes effect from the delivery, and not from the date: Shep. Touchst. 72; Plow. 609, 1 (*a*); *Oshey* v. *Hicks*, Cro. Jac. 263; *Clayton's Case*, 5 Rep. 1; *Doe* d. *Whalley* v. *Telling*, 2 East, 257; *Steele* v. *Mart*, 4 B. & C. 272; and the fact of there being no date, or a date which is impossible, as the 30th of February, does not affect its validity: Shep. Touchst. 72; *Goddard's Case*, 2 Rep. 4 b; *Cooper* v. *Robinson*, 10 M. & W. 694; but where a reference is made to the date for the purpose of computing time, as where a person covenants to pay a sum of money within a certain period from the date, or a term is granted from the date, the computation will be made from the day the instrument bears date (assuming the date to be a possible one), and not from the date of its actual execution: *Styles* v. *Wardle*, 4 B. & C. 908; and see *ante*, Vol. III., sub tit. LEASES, p. 139; and *post*, tit. RELEASES.

The date is *primâ facie* to be taken as the true date of execution; but if it appear that the deed was executed upon a different day to that specified as the date, the latter will be rejected: *Clayton's Case*, 5 Rep. 1; *Browne* v. *Burton*, 5 D. & L. 292; *Joyce* v. *Hughes*, 10 Exch. 432. The legal fiction that no cognizance can be taken of portions of days applies now only to judicial acts: see *Clarke* v. *Bradlaugh*, 7 Q. B. D. 151; *S. C.*, on appeal, 8 Q. B. D. 63; and where two deeds relating to the same matter have been executed on

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deed will not bind a party who has executed it on the assumption that it will be executed by other parties, who fail to do so: *Peto* v. *Peto*, 16 Sim. 590; see *Bolitho* v. *Hillyar*, 34 Beav. 180.

Formal Parts of Purchase Deeds.

the same day, the Court will inquire which of them was executed first: *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.*, 21 Ch. D. 762.

Date in Deeds Poll.

In deeds poll the date is added at the close of the instrument in the *testimonium* or witnessing clause. This clause in indentures refers to the date of the instrument as "the day and year first above written," but does not restate it. In a deed, therefore, whether a deed poll or a deed indented, there should be only one statement of its date, so as to avoid the danger of any question arising from conflicting dates.

2. The Parties.

Enumeration of parties.

Who should be made Parties to a Purchase Deed.]— In indentures, the date is followed by an enumeration and description of the various parties to the instrument. In deeds poll, the description of the grantor or grantors appears in immediate connection with the words of introduction: see *ante*, p. 24. In the case of deeds poll, of course, no difficulty can arise as to the question who should be made parties, but in the case of indentures this is not always an easy matter to determine.

Who should be made parties to a purchase deed.

The conveyancer, however, having determined upon the form and frame of the deed he is about to draw, will be quite safe in making parties to the deed, on the one hand, all those who are to convey (*aa*) any property, or interest in the property, or who are to give any consent or direction in relation to the conveyance, or to confirm the conveyance of any part of the interests affected thereby, or to give a receipt for the consideration or any part thereof, or to release any claim, incumbrance, or interest in the property, or any part thereof, or to give any

(*aa*) This will include as well persons conveying by virtue of their estate and interest in the property, as also persons acting under an express or statutory power, and persons appointed by the Court to convey. See as to the last class of persons, the Trustee Act, 1850 (13 & 14 Vict. c. 60), sects. 20 and 30 (and see *Beckett* v. *Sutton*, 19 Ch. D. 646); the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), sect. 13; and the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), sect. 22.

Parties.

covenant in relation thereto; and on the other hand, all those who are to take any interest or benefit of whatever nature, under the conveyance.

Mortgagor and mortgagee when parties.

The vendor will naturally be a party to a purchase deed. In a transfer by a mortgagee of the mortgaged property, the mortgagor will, or will not, be made a party according to circumstances. If his concurrence can be obtained, he should always be joined in the transfer for the purpose of acknowledging the existing amount of the mortgage debt, and in order that he may be affected with notice of the transaction; but if his concurrence cannot be obtained, he must be omitted, and the transferee must resort to other means for his protection. Again, if a mortgagee is selling under his power of sale, the concurrence of the mortgagor is not in any way necessary: *Clay* v. *Sharpe*, Sug. 396; *Allen* v. *Martin*, 5 Jur. 239; and he would, in fact, not be a proper party to the conveyance. If the mortgagor is selling subject to the mortgage, the concurrence of the mortgagee may, under some circumstances, be advisable and procurable, but not under others; and he will, or will not, be made a party to the conveyance accordingly. But if the mortgagor sell free from incumbrances he must obtain the concurrence of the mortgagee.

Dower.

Under the old law a wife was entitled on the death of her husband to her dower out of all lands of which he was at any time during the coverture solely seised for an estate of inheritance, and to which the issue (if any) of the wife might by possibility have been heir; and her right having once attached was not destroyed by any alienation by her husband. As the dowress was entitled during the remainder of her life to an actual third of such lands to be set out by metes and bounds, and not merely to a money payment out of the estate, the liability to dower was a very serious matter (*b*), and one against which a purchaser was compelled to protect himself by any means in his power. The most satisfactory mode

(*b*) See *ante*, Vol. II., sub tit. CONDITIONS OF SALE, p. 694.

Parties.

of dealing with dower was to procure the concurrence of the dowress (*c*) in the conveyance in order that she might release her dower. This proceeding involved, of course, her being duly consulted in the negotiation of the contract, and her interest being otherwise provided for. The dread of difficulty in these respects led to the devising of modes of ousting her right or preventing it from attaching at all.

The right of the dowress only attached to lands of which the husband had a legal seisin, and not to merely equitable estates; and the various devices adopted to prevent the right from attaching depended upon this distinction. They aimed at placing the husband in such a position that while practically owner in fee, he should not at any time during his life be technically entitled to a legal estate of inheritance in possession (*d*).

(*c*) The dowress may destroy her right by other means than by her concurrence in a conveyance to a purchaser: for instance, in *Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 639; on appeal, 6 Ch. D. 218, the dowress, by joining in a mortgage deed, effectually destroyed her right; but as to the effect of such a concurrence upon the right to dower where the estate in dower had become actually vested before the execution of the mortgage, see *Meek* v. *Chamberlain*, 8 Q. B. D. 31.

Dower uses.

(*d*) To this end, conveyances were usually taken to uses specially framed to bar dower. These limitations, which came to be adopted as the common form for this purpose, limited the lands to such uses as the purchaser should by deed appoint, and in default of appointment to the use of the purchaser for life, with remainder to the use of a trustee during the life of, and in trust for, the purchaser, with remainder to the use of the purchaser in fee. Under these limitations the purchaser was not entitled, during his life, to an estate in the land to which dower could attach; and he could at any time convey this land to a purchaser from him without the concurrence of his wife. By virtue of his power of appointment, he could convey to a purchaser from him without the concurrence of the dower trustee, while, as he was entitled to the fee in remainder, he was also able, if the dower trustee concurred, to convey to the purchaser by lease and release, or any other suitable mode of conveyance.

Attendant terms.

The other mode by which protection was afforded to a purchaser was to procure the assignment to a trustee for the purchaser, of some term of years, created prior to the inception of the estate of the vendor, so that if the dowress proceeded at law for the recovery of her dower, and succeeded, there would of necessity

Parties.

Dower Act.

By the operation of the Dower Act (3 & 4 Will. 4, c. 105), however, the right to dower of a wife married subsequently to the 1st January, 1834, is barred by an alienation by the owner of the land, whether by conveyance *inter vivos* or by his will, and also by a declaration by deed or will that she is not to be entitled to dower; though at the same time her right was made to attach to lands of which he was possessed for an equitable estate, as well as to those of which he was seised for a legal estate. By this extension of the right, the value both of the usual limitations to her dower, and also of the assignment of attendant terms were destroyed so far as regards lands of those married subsequently to the 1st January, 1834, so that it seems to be hardly necessary now to refer to the very extensive learning which grew up in relation to these two subjects. It is, however, still possible that cases may occur in which dower may attach under the old law; and when there is any suspicion that this may be the case careful inquiry should be made, and the purchaser should see either that his conveyance is taken under a power of appointment given to his vendor under the old limitations to bar dower, or that he is protected by the assignment of an ancient term: see *ante*, p. 119, note (*d*).

Concurrence of dower trustee when necessary.

Under the usual limitations to bar dower the owner of the life estate, partly legal and partly equitable, and of the remainder in fee expectant on his own decease, might either exercise his power to appoint, or he might, with the concurrence of the dower trustee, grant the fee, legal and equitable, in the usual way. Very frequently the course adopted was to appoint and also to convey; the appointment and the conveyance being usually contained in the same deed. This expedient was adopted, from abundant caution, to guard against the possible event of the appointment being inoperative from non-

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be a *cesset executio* during the term, and this, as the dowress' estate was for life only, was practically sufficient protection against the enforcement of the claim. A somewhat modern instance of the value of this protection is afforded by the case of *Anderson* v. *Pignet*, L. R. 11 Eq. 329; on appeal, L. R. 8 Ch. 180.

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compliance with the requisition of the power in regard to the mode of its execution or attestation. This reason, however, applied only where the power required the appointment to be executed or attested in some special manner.

It not unfrequently happened, however, that the conveyance was taken not by appointment but by an ordinary assurance, and that for some reason or other, the concurrence of the trustee was not secured. When this was the case a subsequent purchaser was in a position to give considerable trouble, and sometimes cause no little expense by requiring the concurrence in his conveyance of the dower trustee, in order to get in the legal estate limited to him in remainder. That this demand was legally proper but not altogether justifiable appears from the case of *Collard* v. *Roe*, 4 Jur. (N. S.) 431, on appeal 4 De G. & J. 525, where the Court upheld the objection, but gave no costs to either party.

To what lands the Dower Act applies.

The Dower Act applies to gavelkind lands (see *Farley* v. *Bonham*, 2 J. & H. 177) but not to copyholds or to customary freeholds, so that the question of the concurrence of a widow on a sale of lands of these latter tenures held of manors in which the custom gives freebench on the same footing as the old dower, is of considerable importance: see *Lloyd* v. *Lloyd*, 4 Dr. & W. 354.

Of course, when a man does not dispose of his land either by deed or will, and has not made a declaration against dower the right of his widow to dower remains. So, in taking a conveyance from the heir-at-law, the concurrence of the widow of the ancestor to release her dower may be necessary, and, if so, must be obtained by the vendor, *post*, p. 122.

Husband of married woman.

When land belongs to a married woman as her separate estate, she can convey it without the assent or concurrence of her husband, so that it is, in such cases, not necessary to make the husband a party to the conveyance. The same remark applies where a married woman joins in a conveyance in order to perform an act, or give a consent under a power which authorises her to do so as if she were

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a *feme sole*. In other cases it is advisable, and often necessary, to make the husband join in the deed; see as to sales by married women, *ante*, p. 70, *et seq.*

Tenant by the curtesy.

Where a man is, or may be entitled to an estate by the curtesy out of his wife's land, he must concur in any conveyance of the land, or the purchaser must take subject to his interest.

Attorney.

Where a deed is to be executed under a power of attorney, the name of the principal is inserted among the parties, and the deed is in every respect drawn as if the principal were about to execute it. The attorney then executes the deed by sealing and signing it "A.B. [*principal*] by C.D. [*attorney*] his attorney," and delivering it in manner pointed out *ante*, Vol. II. sub tit. ATTESTATION, p. 261. In *Re Whitley Partners, Limited*, 32 Ch. D. 337, it was held that though it was irregular for an agent to sign a document in the name of his principal, without denoting that it was signed by the agent as such, the signature was not on that ground invalid. In that case the document was a memorandum of association of a limited liability company, which was held not to be a deed. Sect. 40 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing, in and with his own name and signature, and with his own seal, and that such execution shall be valid.

Conveyance by committee of lunatic.

When a deed to which a lunatic was a party was executed by the committees of the lunatic's estate in their own names, though they were not parties, without any reference in the *testimonium* to the fact that the lunatic was acting through his committees, it was held that the deed was well executed and had operation as the deed of the lunatic: *Laurie* v. *Lees*, 7 App. Ca. 19.

Vendor must procure concurrence of necessary parties.

The vendor is bound to procure the concurrence of all persons whose concurrence or consent is requisite in order to give full effect to his grant, and whose concurrence he is in a position to procure: see *Costigan* v. *Hastler*, 2 Sch. & Lef. 160; *Steele* v. *Waller*, 28 Beav. 466; *Minton* v. *Kirwood*,

L. R. 3 Ch. 614; but he cannot be compelled to obtain the concurrence of unnecessary parties: *Corder* v. *Morgan*, 18 Ves. 344. Parties.

Order and Arrangement of Parties.]—It is convenient, but by no means necessary, that the parties to an instrument should be named in logical order. It is usual to place them in the order in which they exercise their various functions in the operative part. The party who conveys the legal estate will in conveyances of land be the first named; and then will follow in succession the various parties who convey equitable interests, those who release or confirm, those who enter into any covenants or other stipulations, and, lastly, those who consent to or direct the exercise of any power. The same order will be observed in the arrangement of the parties who receive the benefit of the grant. First will come the party who receives the immediate estate, then, in succession, those who are to take equitable interests of any kind, and who are to have the benefit of any covenants contained in the instrument (*e*). Order of parties.

A difficulty is sometimes felt in determining when two or more persons should be joined as of the same part. A convenient, and as it seems, logical rule, is to join as of the same part only those persons whose interest is absolutely identical, and who will throughout the whole of the conveyance always, so far as the particular capacity in which they are joined is concerned, act simultaneously and in the same manner. Thus, where trustees are parties to an indenture, they should all be made parties of the same part as far as regards their action as trustees; but should the concurrence of any one of them be required in any other capacity, he should be made a party of another part also. So when partners join to convey or to take partnership property they would be named parties of the same part; but should one Arrangement of parties in parts.

(*e*) Where the parties are likely to be numerous, the draftsman will often find it convenient first to frame his recitals, and to defer the enumeration and arrangement of his parties till he has prepared the rest of his draft.

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of them be, for instance, a covenanting party, he will be a party of a separate part. Joint tenants again, whose interests are identical, would in conveying to another person, or in taking a conveyance be named as of the same part, but of course in a conveyance by one joint tenant to his co-tenant, they would be parties of several parts. So also in those cases (now rarer than formerly) in which a husband and wife join to convey the property of the wife, they will be parties of the same part. Generally, it may be said that those parties whose estates, interests or functions in the conveyance are identical, should be joined as of the same part; but that where the estates, interests, or functions of two parties are not identical, they should be made parties of separate parts.

Whether those who are not parties can take under conveyance.

It was formerly a rule of law that no persons could take an immediate benefit under an indenture who were not made parties thereto; though the rule was otherwise with regard to a deed poll: see Co. Litt. 231 a; 239 b. The 5th section of the Act to amend the Law of Real Property (8 & 9 Vict. c. 106) has done away with this distinction, and now under any indenture executed after the 1st of Oct., 1845, a person may take an immediate estate or interest, or the benefit of a condition or covenant relating to any hereditaments, although not named a party to such indenture. It is therefore not now so necessary as it formerly was, that every person who is intended to take an immediate estate or interest should be made a party to the deed; but the old rule nevertheless should, as far as possible, be observed in framing deeds.

Persons concurring in several capacities.

When the same person appears in different capacities in a deed, it is proper that he should be named as a party in respect of each of such capacities, *e.g.*, he may be granting to himself and others, or he may appear both as trustee and as *cestui que trust.*

Description of parties (*f*).

Description of Parties.]—The parties should be

(*f*) See further with reference to this matter, *ante*, Vol. III., sub tit. LEASES, p. 46.

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fully described; that is to say, the Christian name and surname of each, with his address and addition, or description, should be given.

In an indorsed deed, a party who happens also to have been a party to the original deed should be referred to as "the within-named A. B.," and when the deed is not indorsed, but written at the end of or annexed to the original indenture, the party will be described as "the above-named A. B." But in a deed which is intended to be supplemental to a principal deed, under the provisions of the 53rd section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a party who is party to both deeds should, in the supplemental deed, be described in the usual manner in full.

Proper additions.

Care should be taken to ascertain the proper addition to each person's name. A mistake in this respect is by no means fatal, but much trouble may be saved by attention in this matter. A man should be described by the name of his "estate, degree, or mystery," that is, by his rank, profession, or occupation. Thus a merchant should be described as "A. B., of, &c., merchant;" a solicitor as "A. B., of, &c., solicitor," or "A. B., of, &c., gentleman;" a barrister as "A. B., of, &c., esquire, barrister-at-law;" an officer as "A. B., of, &c., esquire, a colonel in her Majesty's army," or "A. B., of, &c., a lieutenant in her Majesty's navy;" a parson as "the reverend A. B., of, &c., Clerk in Holy Orders."

A peer is usually described by his Christian names, with a prefix suitable to his rank, and followed by his title, as "His Grace (or 'The Most Noble') Edward, Duke of A.;" The Most Honourable James Edward, Marquis of B.;" "The Right Honourable Henry, Earl of D. (or Viscount or Baron D.);" but a description of a peer by his title alone is apparently a sufficient description, and his place of residence is usually omitted. A prelate is described as "The Most (or Right) Reverend William, Archbishop (or Bishop) of A." The son or daughter of a peer is usually described as "John D., Esquire (or Emily D., Spinster), commonly called, &c.," giving his

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or her title by courtesy (*g*). A woman should be described as "A. B., of, &c., spinster;" "A. B., wife of C. B., of, &c.;" or as "A. B., of, &c., widow of C. B., late of, &c.;" or simply as "A. B., widow," though "wife" is a good name of purchase without a Christian name: Co. Litt. 3 a. In describing a woman resident with her parents, parties to the deed, her address is frequently omitted, and a statement of her relationship inserted instead.

It is sufficient if enough be expressed to afford reasonable means of identifying the persons referred to. The use of courtesy titles, to designate sons or daughters of noblemen, without the insertion of their strictly legal designation, is therefore allowable: Co. Litt. 3 a; *Janes* v. *Whitbread*, 11 C. B. 406. So a name of reputation of a party different from his Christian name will be sufficient: Bracton, 188 b; Bac. Abr. 378; *Williams* v. *Bryant*, 5 M. & W. 447.

It appears that a man may change his surname from time to time, but not his Christian name. Nevertheless, if he be baptised by one name and confirmed by another, he may purchase by the latter name: Co. Litt. 3 a. When a man has more than one Christian name, the deed will not be invalid if only one of them be used in describing him: *Coke* v. *Brummell*, 2 Moo. 495. Nor will a mistake in a Christian name invalidate a deed: Co. Litt. 3 a.

A bastard may take by his name of reputation, provided that he has, by time, gained such a designation: Co. Litt. 3 b.

Again, *id certum est quod certum reddi potest*, and therefore a conveyance to the first or to the second son, or to all the sons of J. S., will be good: Co. Litt. 3 a; or "all the creditors of A. B.:" *Gresty* v. *Gibson*, L. R. 1 Ex. 112; *Reeves* v. *Watts*, L. R. 1 Q. B. 412; *McLaren* v. *Baxter*, L. R. 2 C. P. 559;

(*g*) As to titles by courtesy, see *R.* v. *Bishop of Chester*, Carth. 440. As to the term "esquire" and "gentleman," see Jacob Law Dictionary and Wharton's Law Lex., sub vv., and see *ante*, Vol. I., p. 793, note. And see as to describing solicitors, &c., as gentlemen in Bills of Sale, *ante*, Vol. III., p. 812.

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but in cases of this latter kind, it is a prudent precaution to make use of a schedule, and to make all the persons who propose to take the benefit of the deed execute in the schedule: cf. *Lay* v. *Mottram*, 19 C. B. N. S. 479.

Description of corporations, &c.

A corporation should be described by its official title, though a certain laxity is herein allowable; it having been held that it is sufficient if the description be accurate enough to be unmistakable: see *ante*, p. 63, note, and Vol. III., p. 46. A Joint Stock Company will be sufficiently described by its technical title only, without any reference to the place of its registered office. The address of a private individual is added because otherwise it would in numberless instances not be possible to identify him; but in the case of public companies this is not so. The Companies Acts prevent any possibility of the simultaneous existence of two companies of the same name, or even of colourably similar names; and the place of their office is upon record, so that a reference to the books of the Registrar of Joint Stock Companies will afford means of identifying the company. The registered office is, however, very frequently stated in the description of a company, and may be convenient as dispensing with the necessity of such reference.

When a number of persons, who traded as a company, were described in a deed under the name of the company, it was held that that description was sufficient, and that there was no need for them to be all described by name: *Maughan* v. *Sharpe*, 34 L. J. N. S., C. P. 19.

Description of capacity in which parties join in conveyance.

It was formerly not uncommon to add to the description of the parties a statement of the capacities in which they join in the conveyance. This, however, is not often necessary, and if unnecessary it should not be done. The only occasions when it is admissible are those in which the same person appears in more than one capacity. If, however, the subsequent parts of the deed explain with sufficient clearness (as they ought invariably to do) what their several capacities are, the statements should be omitted.

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Sometimes, however (though more often in leases and in mortgages than in purchase deeds), there is added to the name and description of the party a short notice to the effect that in the deed the party is referred to by some specific title or description, as "lessor" and "lessee," "mortgagor" and "mortgagee," "vendor" and "purchaser." This course is sometimes advisable in order to save space, where one or more of the parties to the deed consist of a number of individuals; and is also adopted with advantage in cases where a large number of transactions of an identical nature are being carried through, as is the case with building societies or large estates, by means of printed or lithographed forms of conveyance. Elaborate "Interpretation Clauses" will seldom be required in purchase deeds.

3. The Recitals.

As to the Insertion of Recitals.]—The recitals contain the narration of such facts, assurances, and agreements as are necessary to explain the grantor's title, and the motive and reasons upon which the deed is founded: 4 Cru. Dig. 263.

Insertion of recitals a matter of convenience.

The tendency of conveyancers has, for a long period, been in the direction of dispensing with recitals as much as possible; but the multiform estates and interests which the law allows owners of property to create renders it expedient to insert them in a large number of cases. Where an absolute owner conveys all the property comprised in a set of title deeds to one purchaser, and on completion hands over the whole of the deeds to him, recitals in the conveyance seem superfluous. But when an owner sells a portion of his property and retains the deeds, or where property is vested in several persons who all have to join in the conveyance, or where trustees, acting under powers, are concerned in the transaction, it will generally be advisable to make use of recitals. It must, however, be borne in mind that the insertion of recitals is in no case a matter of necessity. The question whether they shall be in-

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serted or not is to be determined simply by considerations of convenience.

When recitals may be dispensed with.

Recitals may without inconvenience be omitted in many cases besides that of a conveyance by an absolute owner. Thus in dealing with leaseholds, the original lease may, if desired, be referred to and identified in the operative part, though it is more usual to recite the lease, giving in full the description of the property as therein described. In a conveyance under a power, it may be quite sufficient to refer to the power in immediate connection with the words of conveyance by the donee of the power. So also in the conveyance of a life interest, such interest is sometimes described in the operative part by reference to the settlement or will creating the interest. The proper use of this method is to be acquired only by practice, and should be used with caution, as it is sometimes difficult to prevent the result from being cumbrous and not easily intelligible.

Object of recitals.

Object of Recitals.]—When a deed contains recitals they follow at once upon the statement of the parties to the instrument. The object of using recitals is that the scope and aim of the deed may be explained sufficiently to account for the joining in the deed of the various parties, and to indicate the capacities in which they execute the deed, and the operation they intend to effect. They have been compared to the preamble of an Act of Parliament, and have been said to be a key to that which follows in the operative part of the deed: *per Mansfield*, C. J., in *Moore* v. *Magrath*, 1 Cowp. 9; see also *Bailey* v. *Lloyd*, 5 Russ. 330.

Recitals are sometimes inserted in order to place upon record upon the title facts and dates, such as births, marriages, deaths, and the like, so that they may be preserved for future use, and that the statements concerning them may, by efflux of time, become legal evidence as between subsequent vendors and purchasers: see Vendor and Purchaser Act, 1874, sect. 2, and *ante*, Vol. II., pp. 633, 677. They may also sometimes prove useful, as creating in certain cases estoppel as against the parties to the deed in which they are contained; as to which see *post*, p. 132.

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Effect of recitals.

Though inaccuracy in the recitals of a deed will not vitiate a deed (see *Withes* v. *Casson*, Hob. 128), they may raise doubts and difficulties in its construction (*h*) At the same time recitals may, if clear and unambiguous, have material weight in the interpretation of doubtful points in the subsequent parts of the deed, and very frequently have been held either to limit or extend the operative part, and even to estop the parties to the deed from denying the statements contained in them.

Whether recitals will control the operative part of a deed.

In considering the effect of recitals in controlling the effect of the operative part of the deed, it appears that the rule is that the whole deed must be regarded, and the intention of the parties to the deed must be gathered from it; and that the recitals or the words of the operative part will take effect according as the one or the other exhibits a clear statement of the intention. But "the reciting part of a deed is not at all necessary either in law or in equity. It may be of use to explain a doubt of the intentions and meaning of the parties; but it hath no effect in operation:" *Bath and Montague's Case*, 3 Ca. in Ch. 96, 101; see *Pughly* v. *Sharpe*, 10 Bing. 84; *Bailey* v. *Lloyd*, 5 Russ. 530; *Alexander* v. *Crosbie*, Ll. & G. 145. So that unless there be some ambiguity in the operative part of the deed, recourse will not be had to the recitals.

In the case of *Jenner* v. *Jenner*, L. R. 1 Eq. 361, the recitals specified as the subject-matter of the deed certain estates which were comprised in two recited instruments, the operative part was sufficiently wide to embrace another estate not included in either of those instruments, and it was held that this last-mentioned estate did not pass. In Com. Dig.

(*h*) See Preston, 1 Abs. 62, where that able writer lays it down that "Whatever errors may be in recitals, and in whatever degree they may perplex the evidence in point of deduction, yet a substantial independent grant of parcels, &c., by a full description or by certainties, which are free from mistake, will not be impugned by any error in the recitals." But in his note to Shep. Touchst., p. 77, n., 64, Mr. Preston calls attention to the necessity for accuracy in the recitals of assignments of terms of years, and see also Bac. Abr. *Grants* (H.), 1.

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Parols (A.), 19, it is said that "a recital does not confine subsequent words by which the intent appears more large;" and this statement of the law seems to be readily reconciled with the case of *Jenner* v. *Jenner*, if it be borne in mind that the statement is intended to apply to cases in which the intention of the parties that more shall pass than is mentioned in the recitals is clear and unmistakable. Compare the case of *Young* v. *Wallingford*, 52 L. J. Ch. 590, and the remarks of Lord *St. Leonards* in *Alexander* v. *Crosbie*, Ll. & G. 145 (a case the converse of *Jenner* v. *Jenner*), when he says, "If there are two parts of a deed inconsistent with each other I must sacrifice one; but can I have any doubt in sacrificing the general description in the first part in favour of that in the latter part, in which there is a clear, defined, and expressed intention." See also *Walsh* v. *Trevanion*, 15 Q. B. 733. Another statement of the rule is that clear words in the operative part cannot be affected by the words of the recital. This form of expression amounts to the same as that set out above, as the intention of the parties is presumably better gathered from the actual grant than from the less formal recital. Thus, in *Rooke* v. *Lord Kensington*, 2 K. & J. 753, it is said that clear words of conveyance cannot be controlled by words of recital, but that general words are not within the description of clear words of conveyance which cannot be so controlled.

Clear words of operative part not affected by recitals.

In addition to the cases above referred to, the following cases may be referred to as affording examples of words of conveyance controlled by recitals: *Haggett* v. *Giles*, 2 Roll. Abr. *Graunts* (P. 2), 491, 45; *Henn* v. *Hansen*, 1 Sid. 141; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235; *Morris* v. *Wilford*, 2 Show. 47; *Moore* v. *Magrath*, 1 Cowp. 9; *Parkhurst* v. *Smith*, Willes 327; *Pearsall* v. *Summersett*, 4 Taunt. 593; *Payler* v. *Homersham*, 4 M. & S. 432; *Ringer* v. *Cann*, 3 M. & W. 343; *Solly* v. *Forbes*, 2 Br. & B. 38; *Lindo* v. *Lindo*, 1 Beav. 496; *Doe* d. *Meyrick* v. *Meyrick*, 2 Cr. & J. 223; *Cholmondeley* v. *Clinton*, 2 J. & W. 1; *Hunt* v. *White*, 27 L. J. Ch. 326; *Denison* v. *Holiday*, 28 L. J. Ex.

Cases of operative words restricted by recital.

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25 ; *Hopkinson* v. *Lusk*, 12 W. R. 392 ; *Gray* v. *Earl of Limerick*, 2 De G. & Sm. 370 ; *Childers* v. *Eardley*, 28 Beav. 648 ; *Barratt* v. *Wyatt*, 30 Beav. 442 ; *Re Michell's Trust*, 9 Ch. D. 5 ; *Danby* v. *Coutts & Co.*, 29 Ch. D. 500 : *Re de Ros*, *Hardwick* v. *Wilmot*, 31 Ch. D. 81 ; *Ex parte Dawes*, 17 Q. B. D. 275 ; and, with regard to releases : 4 Cru. Dig. 245.

Case when operative words not restricted.

Instances in which, on the other hand, the operative part being sufficiently clear, the recital has not been allowed to have the effect of controlling it, may be found in the following authorities : *Ingelby* v. *Smith*, 10 Bing. 84 ; *Bird* v. *Lake*, 1 H. & M. 111 ; *Willoughby* v. *Middleton*, 2 J. & H. 344 ; *Ramsden* v. *Smith*, 2 Drewry, 298 ; *Hammond* v. *Hammond*, 19 Beav. 29 ; *Campbell* v. *Bainbridge*, 14 Beav. 222 ; *Young* v. *Smith*, L. R. 1 Eq. 180 ; *Dawes* v. *Tredwell*, 18 Ch. D. 354.

Covenants may be controlled by recitals.

In a case in which it was recited that a covenant to levy a fine was to be entered into, but no such covenant was contained in the deed, it appearing that the deed purported to deal with property in a manner which was impossible in the absence of such a covenant, it was held that the covenant must be supplied : *Holles* v. *Carr*, 3 Swanst. 638 ; compare also the cases of *Trethewy* v. *Ellesdon*, 2 Vent. 141 ; *Langdon* v. *Goole*, 3 Lev. 21 ; *Lord Say and Seal's Case*, 10 Mod. 40 ; *S. C.* in Dom. Proc. 4 Bro. P. C. 73 ; *Spryve* v. *Topham*, 3 East, 115 ; and *Dent* v. *Clayton*, 10 Jur. N. S. 671.

Recitals may also control the covenants subsequently contained in the deed, as in the case of *Barton* v. *Fitzgerald*, 15 East, 530 ; where a recital that the assignee of leaseholds had an absolute term, was held to render his covenant that the lease was valid and subsisting, an unconditional covenant.

Estoppel by Recital.]—It was laid down by Lord *Coke* (Co. Litt. 352, b), that a recital doth not conclude, because it is no direct affirmation ; but it now appears to be settled law that a recital may contain statements so specific and particular as to conclude the parties to the deed from averring the contrary : *Salter* v. *Kidley*, 1 Show.

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59 ; *Marchioness of Annandale* v. *Harris,* 2 P. Wms. 432; *Ford* v. *Gray,* 1 Salk. 285; *Battersbee* v. *Farringdon,* 1 Swanst. 106; *Lanison* v. *Tremeere,* 1 A. & E. 792; *Bowman* v. *Taylor,* 2 A. & E. 278; *Doe* d. *Butcher* v. *Musgrave,* 1 M. & Gr. 625; *Gwyn* v. *Neath Canal Co.*, L. R. 3 Ex. 209. In order to have this effect, however, the statement must be clear and unambiguous: *Palmer* v. *Ekins,* 2 Ld. Raym. 1553. Thus, on a recital that the grantor is seised of or otherwise well entitled to the land in question, no estoppel, so far as regards the legal estate in the land, will arise: *Right* d. *Jeffreys* v. *Bucknell,* 2 B. & Ad. 278; *Heath* v. *Crealock,* L. R. 10 Ch. 22. Again, a recital will bind only those who are parties to the deed, or those claiming under them, who must be taken to have entered into the contract on the faith of the statements contained in the recital, but will not affect the right of third parties, who cannot be taken to have so contracted: *Stroughill* v. *Buck,* 14 Q. B. 781; *Beckett* v. *Bradley,* 7 My. & Cr. 994; *Whitton* v. *Peacock,* 2 Bing. N. C. 411; *Gaunt* v. *Wainman,* 3 Bing. N. C. 69; *Doe* d. *Marchant* v. *Errington,* 6 Bing. N. C. 79; *Taylor* v. *Needham,* 2 Taunt. 278; *Pitt* v. *Williams,* 5 A. & E. 885; *Doe* d. *Gainsford* v. *Stone,* 3 C. B. 176 (*i*). Nor will a recital be available by way of estoppel in any action or proceeding, except such as are directly concerned with the deed containing the recital: *Stroud* v. *Willis,* Cro. Eliz. 362; *Carpenter* v. *Buller,* 8 M. & W. 209; *Hill* v. *Manchester, &c., Waterworks Co.*, 2 B. & Ad. 544; *Carter* v. *Carter,* 3 K. & J. 617. A recital may also be taken to be the language of one party only to the deed, so as to

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Trustees for public purposes.

(*i*) In *Fairtitle* d. *Mytton* v. *Gilbert,* 2 T. R. 169, *Ashurst,* J., is reported to have said that "In general the party granting is estopped by his deed to say he has no interest; but that general principle does not bind trustees not acting for their own benefit, but for the benefit of the public." That dictum was, however, made with reference to trustees acting under the powers of an Act of Parliament, which was presumed to be known to all persons, and with which the matter relied on as an estoppel was inconsistent. But, as a general rule, trustees for public purposes are bound by false statements, &c., as much as other persons: *Doe d. Levi* v. *Horne,* 7 Jur. 38.

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estop him, while it will not estop the other: *Doe* d. *Rogers* v. *Brooks*, 3 A. & E. 513; though recitals have, as a general rule, been held to be mutual, as amounting partially to an admission on the part of both parties, so as to prevent either party from pleading matters which are contrary to or inconsistent with that which in their deed they have solemnly asserted: *Bringloe* v. *Goodson*, 5 Bing. N. C. 740; *Shelley* v. *Wright*, Willes, 9; *Young* v. *Raincock*, 7 C. B. 310. It is further a rule of law that no estoppel arises when the truth appears by the same deed as that which contains the statement relied upon; but there seems to be a material exception to this rule in the case of leases; for it has been held that, even though it appears on the face of a lease that the lessor has no legal reversion, the lessee nevertheless is not at liberty to question his right to distrain: *Damer* v. *Hastings*, 12 Moo. 34; *Pargeter* v. *Harris*, 7 Q. B. 708; *Morton* v. *Woods*, L. R. 4 Q. B. 293. When, however, a recital contains a statement which was a mistake on the part of both parties to the deed, no estoppel arises: *Rowe* v. *Huntingdon*, Vaughan, 82; *Re Carter's Trusts*, L. R. 3 Eq. 495; *Brooke* v. *Haymes*, L. R. 6 Eq. 25; *Empson's Case*, L. R. 9 Eq. 597; *Ex parte Morgan*, *In re Simpson*, 2 Ch. D. 72. Nor will estoppel be worked by a recital containing matter extraneous to the actual contract: *Kipp* v. *Wiggett*, 10 C. B. 35; *Doe* d. *Shelton* v. *Shelton*, 3 A. & E. 265; *Gillett* v. *Abbott*, 7 A. & E. 783.

Estoppel extends to all assurances (*k*).

The cases have applied the doctrine of estoppel to assurances of all kinds. Thus it was formerly

(*k*) See further as to estoppels, *Doe* v. *Bishop of Llandaff*, 2 Bos. & P. 491; *Hume* v. *Barton*, 1 Ridg. P. C. 247; *Jersey* v. *Deane*, 5 B. & Al. 569; *Gaunt* v. *Warnman*, 3 Scott, 413; *Magrath* v. *Hardy*, 6 Scott, 627; *Doe* v. *Skirrow*, 2 Nev. & P. 123; 7 Ad. & E. 157; *Doe* v. *Errington*, 3 Jur. 1126. A surrender of copyholds does not estop (see 1 Watk. Cop. 210; *Taylor* v. *Philips*, 1 Ves. sen. 230; *Goodtitle* v. *Morse*, 3 T. R. 365); but a copyholder is estopped by his admittance from disputing the title of the lord who admitted him: *Doe* d. *Nepean* v. *Budden*, 5 B. & Al. 626. As to the conclusiveness of an acknowledgment, in an indenture, of the receipt of the consideration money, *vide post*, p. 158.

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held that contingent interests were not transferable by deed; but it was also held that where a deed professed to convey such an interest, the deed would, immediately upon the happening of the contingency, become operative by estoppel, so as to vest the estate in the grantee: *Doe* v. *Oliver*, 10 C. B. 181.

Bensley v. *Burdon.*

So also in the case of *Bensley* v. *Burdon*, 2 S. & S. 519, the grantor recited that he was entitled to a remainder in fee expectant upon the determination of the life estate of his father, and granted an annuity charged on such remainder, and also conveyed the remainder upon trust for sale; at the time of this transaction the grantor had no estate whatever in the lands in question, but it was held that the first conveyance operated at law by estoppel. Lord *St. Leonards* says of this case, that it was "upon appeal affirmed, but the principal point upon estoppel has since been properly overruled," apparently referring to the case of *Right* d. *Jeffreys* v. *Bucknell*, 2 B. & Ad. 287; and the same learned writer, in another place, speaks of the doctrine of *Bensley* v. *Burdon*—that a lease and release operated by estoppel—as "an obvious error:" see also *Lloyd* v. *Lloyd*, 4 Dr. & W. 354.

Right v. *Bucknell.*

Bensley v. *Burdon* was decided by the Vice-Chancellor, upon the general ground that it was a deed indented, and that the nature of the conveyance, namely, lease and release, made no difference. The Lord Chancellor confirmed this judgment: *Bensley* v. *Burdon*, 8 L. J. Ch. 85; but put it on this solely, that it was an allegation of a particular fact, by which the party making it was concluded. That case, therefore, greatly differed from the case of *Right* d. *Jeffreys* v. *Bucknell*, 2 B. & Ad. 278, in which there was no certain precise averment in the deed of release of any seisin in the grantor, but a recital only that he was legally or equitably entitled. It was therefore held that the recital did not operate by way of estoppel.

The Court, in deciding the case of *Right* d. *Jeffreys* v. *Bucknell*, quoted Littleton, sect. 446, as laying down that "no right passes by a release but the

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right which the releasor had at the time of the release made. For if there be father and son, and the father be disseised, and the son (living the father) releaseth by his deed to the disseisor, all the right which he hath or may have in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor." The Court quoted also *Wivel's Case*, Hob. 45, and Perk. sect. 65, that where a son and heir joins in a grant in the lifetime of his father, while he has neither possession nor right in the matter granted, the grant is utterly void, and nothing passes; and referred to the Year Books, 49 Ed. 3, 14, 15; 45 *Ass.* 5; 46 *Ass.* 6; and *Brook's* construction of those books in his Abr. tit. *Estoppel*, pl. 146; 10 Vin. Abr. *Estoppel* (m): see *Heath* v. *Crealock*, L. R. 10 Ch. 22; compare the admission of Mr. Preston, in the case of *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 A. & E. 2.

In the case of *Right* d. *Jeffreys* v. *Bucknell* there was no distinct allegation in the deed that the grantor was seised; and it therefore seems to be quite consistent with previous determinations, which only went to the length of saying that a fine, indenture, &c., estops the party acknowledging or executing it from denying what he therein directly or impliedly asserts to be true. But the case quoted from Littleton, and the cases cited by the Court, seem to bear upon a different point. The actual effect of a deed at the time of its execution is of course a question of law, and the law holds that a grantor can only convey that which he actually has. But if a grantor says in distinct terms, by his deed, that he possesses an estate (though in fact he has it not), the law also says that if at any subsequent period he acquires that estate, he shall be estopped from denying that he had it at the time of the conveyance, and his deed will be held to operate accordingly. But, on the other hand, if he has such a right or such an estate as will satisfy his own statement, obviously there is no estoppel. Now the case cited from Littleton, of a release to a disseisor by the heir apparent of the disseisee of all the right which such

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heir had or might have, and the like case of a grant by an expectant heir from Perkins, are cases in which the grantor assumed to have no more than he really had, and there was clearly no estoppel. A party is estopped by his deed,—not from disputing that he passed what he assumed to pass, for the effect of the deed is a matter for the law's interpretation solely: see *Doe* d. *Candler* v. *Ford*, 3 A. & E. 649; but he is estopped from afterwards denying that he had what he then asserted himself to have: see *Bowman* v. *Taylor*, 2 A. & E. 278; followed in *Bowman* v. *Rostron*, 2 A. & E. 283; *Hume* v. *Barton*, 1 Ridg. P. C. 247; *Rees* d. *Chamberlain* v. *Lloyd*, Wightw. 123; see also *Smith* v. *Baker*, 1 Y. & C. C. C. 223. But a recital may be contained as much in the operative part of a deed as in any other part; and therefore it is quite consistent with what was said in the above judgment (that a release by mere force of the operative words, does not amount to an estoppel), to hold that a conveyance by lease and release without any recital at all, purporting to convey an estate which the grantor has not, may work an estoppel, and this was the meaning of Sir *J. Leach*, in the case of *Bensley* v. *Burdon*: see *Newton* v. *Weeks*, All. 76.

Estoppel may be by deed-poll.

The observation of Littleton, sect. 693, with regard to the effect of estoppel by *indenture* to prevent *remitter* (see *Hayne* v. *Maltby*, 3 T. R. 438), may serve to explain the origin of the notion, that a deed cannot work an estoppel unless it be indented. This, of course, was true in the case of remitter, because the person to be estopped in such case could not be party to the deed at all unless it were an indenture. But there seems to be no ground for the opinion that a deed-poll cannot operate by estoppel. The rule is expressly stated to be otherwise by Lord *Tenterden*, in *Right* v. *Bucknell*; and in *Lainson* v. *Tremeere*, 2 A. & E. 792, it was held that the obligor of a *bond* was estopped by a recital in the bond. See also *Stroud* v. *Willis*, Cro. Eliz. 362; *Hosier* v. *Searle*, 2 Bos. & P. 299; *Bonner* v. *Wilkinson*, 5 B. & Al. 682.

Carpenter v. *Buller*.

In the case of *Carpenter* v. *Buller*, 8 M. & W.

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Estoppel by recital, when binding.

212, the law as to estoppel by recital was thus laid down by *Parke*, B.:—"If a distinct statement of a particular fact is made in the recital of a bond or other instrument, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Co. Litt. 352 b: and a recital in instruments not under seal may be such as to be conclusive to the same extent."

In this case, which was an action of trespass brought to try the title to a piece of land, it was held that a recital that the defendant was seised in fee of certain lands described by reference to a map, and, by such description, including the *locus in quo*, contained in a deed to which the plaintiff and defendant were parties, but which deed did not relate to the title to the lands, but only to an adit which it was proposed to construct, would have been conclusive only in an action arising out of the deed.

Commencement of recitals.

Contents of Recitals.]—In cases in which the introduction of recitals is considered necessary, it is sometimes not easy to determine at what point of the title the recitals should be made to commence. It was formerly considered to be desirable, in reciting the title of the conveying party, not only to show what estate is in him, but also, by referring to some previous instrument in which may be found a recital carrying the title back another step, and pointing out the sources of still further information, to provide in the documents of title themselves a connected chain of recitals, or history of the title. Having regard to the value of recitals as evidence under statutory or special conditions of sale, it may be laid down as a general rule that the safest course is to commence the recitals with a deed which either satisfies, or will by lapse of time come to satisfy, the definition of a good root of title (*l*), and to deduce

(*l*) See *ante*, Vol. I., sub tit. ABSTRACTS, pp. 52, 56 *et seq.*

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the title strictly, or as strictly as possible, from that point in its history down to the transaction out of which the conveyance arises. The recitals should at all events be carried sufficiently far back to explain fully what are the estates and interests of those who are dealing with the property, and how they arose.

What should be stated in recitals.

It is important in framing recitals (*m*) to bear in mind that nothing should be mentioned or referred to in them which is not absolutely necessary for the proper elucidation of the subsequent parts of the deed, and which has not a clear bearing in this respect. There are certain recognised rules in this connection, the observance of which may prevent unnecessary, and therefore improper matter from being included in recitals. The first rule is that the recitals should contain nothing but statements of facts, assurances, and agreements (4 Cru. Dig. 263), and that anything savouring of an inference from the facts should be avoided. Thus, in reciting a title by descent, it is not good conveyancing to state that B. is the heir of A. The recitals should state all that is necessary to prove the heirship of B., and the fact that the title is traced through him will be sufficient to show that the conveyancer regarded him as the heir. If it be recited that he was the heir of A., either the recital is correct, in which case

First rule :— Recitals should state facts, not inferences.

(*m*) It was formerly the custom in mentioning dates of deeds or deaths, or other occurrences, in recitals to refer to them as bearing date "on or about" such and such a date. The practice appears to have been adopted on the analogy of the rules of pleading; for, in pleading a deed a mistake in the averment of its date would have been fatal, and by using the phrase, "on or about," the materiality of the date was taken away, and an averment of the true date was let in. In addition, a misrecital, as regards date, may have serious consequences. Thus, a lease bearing date the 1st of March may, in an assignment, be recited as bearing date the 2nd of March, and then there would be an assignment of all the lands which were demised by the "hereinbefore recited indenture of lease." Now, as there is not any such indenture of lease, there is, in point of law, no valid assignment; for, as the date in the recital is the essential part of the descriptive terms used in the assignment, the assignment itself fails of effect. No doubt, however, the courts would relieve against a mistake of this kind: an opinion which is expressed by most of the books.

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nothing is gained, or it is inaccurate, and therefore mischievous. The one exception is that it may sometimes be thought advisable that the seisin of the grantor should be recited: see *Bolton* v. *London School Board*, 7 Ch. D. 766, *post*, p. 142. Generally speaking, however, either an inference of law is obvious, in which case the recital is unnecessary, and therefore mere surplusage, or it is not obvious, and then the draftsman seems to be usurping the functions of the judge.

Second rule:—Negative recitals should be avoided.

The second general rule is that negative recitals should be avoided. All material facts should be set forth, and it should be left to inference that what is not stated either did not happen, or was not material. Custom has, however, set up an exception to this rule in the case of matters, on the non-occurrence of which the title depends. Thus, if there be a gift over in default of issue of the marriage, it is very usual to recite that there was no issue, or if there be a gift over in default of appointment, the statement that no appointment was made is considered admissible. So also it is an almost universal practice to recite that a testator died without altering or revoking his will. In all such cases the recital might safely and properly be omitted. The previous recital of the settlement or will in both the cases first instanced must show the fact that the property would go in a certain way in default of issue or, as the case might be, of appointment; and it might quite legitimately be left to inference that if the devolution of the title be shown in a manner consistent with such default, the default happened. And inasmuch as if a will has been revoked or altered, it would be the clear duty of the draftsman either to omit all reference to the will, or to state the alteration, the statement negativing revocation or alteration is not to be reconciled with sound principles of conveyancing. These exceptions, however, appear to have become established by usage.

Third rule:—Recitals should be relevant.

The third general rule is that nothing should be stated in the recitals which is not relevant to the intended operation of the deed having regard to the

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subject-matter on which it is intended to operate. It may be useful to indicate by a few examples what facts and statements are to be omitted in obedience to the rule that nothing irrelevant is to appear in the recitals. Executors have, in general, no powers over real estate passing under a will; it is therefore, as a rule, improper, in reciting a will of real estate, to refer to the appointment of executors; nor is it strictly necessary to state the date and place of probate, though these details may reasonably be added, as they may give valuable clues in future: *Weddall* v. *Nixon*, 17 Beav. 160. In reciting limitations in a settlement or will, only so much should be set out as is necessary for the purposes of the deed. Thus, if the deed be a dealing by the tenant for life only, *e.g.*, a sale of the life estate, or of the fee simple under the provisions of the Settled Land Act, 1882, the recital will go no further than is sufficient to show the creation of the estate of the tenant for life. If, however, the tenant for life and the tenant in tail join in the deed in such a way as to render the recital of their estates necessary, the limitations of the settlement will be set out down to the end of the creation of the estate tail. In reciting powers in a settlement or will, or other instrument which are being exercised, only so much should be stated as is sufficient to show authority for the transaction in question. Thus, in reciting a power of sale and exchange, if the deed be a conveyance on sale, the recital will only set out so much of the power as relates to selling, while if the trustees are effecting an exchange, the references to selling will be omitted, and the power to exchange with its ancillary clauses will be set out. The rule is even carried further; for if trustees are selling under a power of sale, all references to survivors and their representatives and assigns will be omitted if all the original trustees are joining in the deed; while the references in the power to survivors and so forth, will be inserted in the recital according as the power is being exercised by surviving trustees, or by surviving and new trustees, or by the representatives of trustees, or by their assigns. It is at the present

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day unusual to mention places of birth, baptism, or marriage; but so much trouble in future searches might be saved by referring to these details, that it may be questioned whether the abandonment of the former practice of so doing is altogether advantageous.

Insertion of recitals so as to create evidence.

Formerly, in conditions of sale, it was usual to insert provisions that recitals contained in deeds dated a specified number of years or more prior to the day of sale, should be taken as sufficient evidence of the matters therein stated. The wording of the conditions varied according to circumstances, and would often be made to cover not only statements of facts and of the contents of documents, but also statements or even inferences of law. By the operations of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78, sect. 2) (*n*), there is implied in every open contract for sale of land a limited condition of this nature, as between the vendor and purchaser, viz., that recitals, statements, and descriptions of facts, matters, and parties contained in deeds and other documents twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions. In *Bolton* v. *London School Board*, 7 Ch. D. 766, it was held by *Malins*, V.-C., that the purchaser was bound to be satisfied with a recital of seisin in the deed with which the abstract began, and which was dated more than twenty years before the date of the contract. The decision has been much questioned, on the grounds that the result of it would practically exclude the purchaser from requiring the abstract to be carried back over the statutory (*o*) period, and also that the statement

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(*n*) See the section set out at length, *ante*, Vol. II., sub tit. CONDITIONS OF SALE, p. 633.

(*o*) That is forty years, or, under certain circumstances, sixty years: see Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78, s. 1), and *ante*, Vol. I., sub tit. ABSTRACTS, pp. 52 *et seq.* The earlier documents of title might show that the recital of seisin was inaccurate. It would seem, however, that the truer view of the effect of sect. 2 of the Vendor and Purchaser Act, 1874, is that it

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that a man is seised in fee is not a statement of fact, but a statement of law. It has indeed been held in cases such as *Bensley* v. *Burdon*, and the like (see *ante*, p. 135), that statements of a similar nature are to be treated as statements of fact, but it is submitted that there is a distinction between a case when a vendor is to be held to a statement of law made by himself, and founded upon his own title, and a case where a stranger to the deed is to be held bound by a statement so made. In consequence of the decision in *Bolton* v. *London School Board*, it has become very usual in practice to insert in conveyances of land a recital that the vendor is seised in fee simple, with the view of rendering the conveyance, after twenty years from its execution, a sufficient root of title under an open contract.

Having regard to sect. 2 of the Vendor and Purchaser Act, 1874, recitals may clearly be of considerable service, and may properly be employed for the express purpose of placing upon record facts and matters with a view to their becoming, by lapse of time, available as evidence on future sales. For instance, should a case such as *Fort* v. *Clark*, 1 Russ. 601 (in which the recitals contained statements as to pedigree), arise, it would doubtless now be held that the recitals were sufficient evidence. Or again, recitals may indirectly prove important as evidence, as in *Forsyth* v. *Bristowe*, 8 Exch. 176, where a recital in a conveyance of an equity of redemption, that all interest in the mortgage debt had been paid up to that date, was held to be sufficient to take the case out of the Statute of Limitations.

Order of recitals.

Order of Recitals.]—It is well established that the proper order of recitals is that of time. Every

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does not come into operation until the primary condition of a proper abstract having been delivered by the vendor has been complied with. Analogous points raised under the Conveyancing Act, 1881, sect. 3 (6), were so decided by the Court of Appeal in *Re Johnson and Tustin*, 30 Ch. D. 42; see also *Re Moody and Yates' Contract*, 30 Ch. D. 344.

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fact and deed should be recited in the order of their respective dates. There is one exception to this rule, in the case of a will, which is generally recited immediately before the death of the testator, and not according to the date of signature. This exception is, however, apparent rather than real; for since the Wills Act (1 Vict. c. 26, sect. 24), all wills, with reference to the real estate and personal estate comprised in them, speak from the date of the testator's death, unless a contrary intention appear thereby. This being so, no confusion arises from placing the recital of the will at the date at which it becomes operative. Formerly wills spoke, as to realty, from the date at which they were made, and confusion might be occasioned by reciting them otherwise than in the order according to date. If a will dated before, and not republished after the Wills Act, should have to be recited, it would still be proper to recite it in the place indicated by its date; but such a contingency is not now likely to occur.

Reciting two or more titles.

The rule above referred to is sufficient to guide the conveyancer in dealing with simple cases. But where there are two or more distinct titles to be recited, as in the case of a sale of property originally derived from various sources, or in the case of a sale by several co-owners, or in tracing the devolution of the legal and of the equitable estate, it may be difficult to decide in what order to place the recitals. Even in such cases the safest general rule seems to be to adhere strictly to order of date. It may, however, sometimes be convenient to treat each title quite separately, and to take one of them and recite all that there is to be recited with respect to it, in order of time, down to the point where the titles unite, and then to break off and take up the other title from its commencement, and bring it in the same way down to the point of union, and then taking up the combined title to carry it to its conclusion in due sequence. Practice alone will teach the best means of dealing with cases of complication. In deciding upon the order of recitals, as upon the previous question whether there are to be any recitals used or not, the

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conveyancer should keep steadily before him the consideration that he has to frame his deed in such a manner as will make it most clear and intelligible to those who will in the future have to refer to it.

Narrative, general, particular, and introductory recitals.

Different kinds of Recitals.]—Recitals are usually said to be of two kinds, narrative and introductory; and narrative recitals may be further subdivided into general and particular recitals. Narrative recitals are those which recount the facts and instruments through which the title is deduced. General recitals are never used except at the beginning of a chain of narrative recitals, and are so called because they recite only the general tenour and effect of the recited instrument; all the subsequent narrative recitals will be particular, and are distinguished from the general recitals in that they not only state the effect of the deed, but also recount the means whereby the effect of the deed is produced. The introductory recitals are those which connect the account of the title given by the general and particular recitals, with the operative parts of the deed.

General recitals.

In beginning the account of the title it is usual to recite that by the deed selected as the starting point the property was assured or limited to the purchaser under it, or in a certain manner, without defining the mode in which the assurance was effected or by whom. This is considered sufficient for the purpose, and there seems no reason to alter a rule so well established. There are, however, three exceptions to the rule. First, a will is always recited formally, mainly because nothing can be gained by reciting it shortly, and much may be lost, owing to the difference between the effect of a general and a specific gift. Secondly, where the series of deeds begins with a mortgage, the mortgage is always recited particularly, so as to shew both the amount for which the deed was a security, and the person in whom the equity of redemption was then vested; for whatever be the nature of the instrument which is in process of being drawn, if its recitals include a mortgage these details will be necessary to its proper comprehension. Thirdly, in assignments of leaseholds

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if the consent of the lessor be required to the assignment, or if it be advisable, for any other reason, to shew who is the lessor, the lease will be recited particularly and not generally. Where there are two or more titles to be recited in the deed, each of them should begin with a general recital. This may be useful to those through whose hands the deed has subsequently to pass, as the occurrence of a general recital will of itself indicate the beginning of another title.

Particular recitals.

In the subsequent narrative recitals the deeds will be stated formally. For the general recital having stated that the property was vested in I. S., it must be shewn what I. S. did with it; and accordingly the next recital will be to the effect that I. S. mortgaged or sold the property to a mortgagee or purchaser, or as the case may be. In particular recitals it is therefore stated that the said I. S. appointed or granted the property to the appointee or grantee, or to such and such uses.

Rules to be observed in framing narrative recitals.

Two important rules with regard to framing recitals may be referred to here. First, in reciting deeds the draftsman should make up his mind whether he will recite a deed or certain parts of it *verbatim*, or only give the effect of its provisions; whichever course be selected he should not, in reciting the same part of the deed, employ both methods. He may properly give the effect of some portion of the deed, and a *verbatim* statement of others; but no portion of a deed should be given partly in paraphrase and partly *in eisdem verbis* (*o*).

Secondly, the practice should be avoided of inserting recitals within recitals. Every fact and instrument should be independently stated according to its order of date, and not as having been recited in a recited instrument. Otherwise it will be impossible to present an intelligible view of the chronological order, bearing and operation of the facts and events stated.

Mode of reciting deeds.

Deeds must be so recited as to afford full means

(*o*) Instruments containing powers intended to be exercised, or provisions of a special and unusual character should generally be recited *verbatim*: see notes to the following Precedents.

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for identifying them, and to give clear and complete information, so far as is necessary for the purpose in hand, of their contents and effect. Deeds are usually identified by their dates and the names of the parties; and it is considered sufficient to set out the names of the parties, omitting their descriptions. If a party to the recited deed has subsequently to its date changed his name or title, he will be described in commencing the recital by both names or titles, and subsequently only the last name or title adopted by him will be used. Thus in reciting a marriage settlement the wife will be referred to as "C. B. the wife of A. B. then C. D. spinster;" and afterwards only as C. B. Or where a person has been raised to a peerage, he will in the recital of a deed executed by him prior to his elevation, be described as "The Marquis of X. then I. S.," and in subsequent recitals his title may alone be used, "the said Lord X." Each deed is very often described by the technical designation appropriate to it. Thus a mortgage may be described as "an Indenture of mortgage, dated, &c.," while a marriage settlement may be described as "an Indenture, dated, &c., and made between, &c. (being the settlement made in consideration of the marriage afterwards solemnised between the said A. B. and C. B.)." The plan is useful, as it assists those who have to peruse the deed afterwards, but must be done with accuracy. It is also usual to mention in the recital of an indorsed deed that it is so indorsed, and to specify the deed upon which it is indorsed; and it will be convenient in reciting a supplemental or annexed deed, to describe it as being supplemental or annexed, and to indicate which is the principal deed. This precaution will in some instances be necessary, as the effect of some supplemental and annexed deeds will depend materially on the nature and terms of the principal deed, and it will be essential that the recitals should clearly indicate the principal deed.

Indorsed supplemental and annexed deeds.

In reciting conveyances by way of sale no mention is made of the consideration. In reciting mortgages this is always done, as the repayment of or other dealing with the mortgage money must of necessity

Consideration whether to be recited.

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occupy the attention of the draftsman sooner or later in the course of his draft.

Recital of will.

In reciting a general devise of real estate there is no occasion to introduce it with a statement of the seisin of the testator, unless the will was made before the Wills Act; in other cases, the testator's seisin should be stated in the recital of his death.

Recital of title to leaseholds.

There is an exception of some importance to the rule already referred to (*p*), that when once the recitals are begun they should be continued without break down to the date of the transaction in hand. In reciting the title to leaseholds it is customary, when the original lease is recited, to refer to the subsequent title without detail under the description of "divers mesne assignments and acts in the law," or some similar and appropriate phrase.

Introductory recitals.

Introductory recitals may generally be dispensed with, except where a deed contains narrative recitals. The introductory recitals explain the immediate motive and intention of the parties in whom the preceding recitals have shewn the property to be vested. In conveyances on sales the introductory recitals are usually a statement of the agreements between the parties as to the transaction, and matters incident thereto. The statement should be in general terms, and should not specifically refer in any way to any contract or agreement in writing or otherwise; nor (except in very special cases, and in sales under the direction of the Court) should it be stated that the property was sold by auction, or under any special conditions. If any reference be made to a preceding contract, or to conditions of sale or other similar instrument, the document so referred to becomes part of the title, and is liable to be called for on any future sale. In some instances where there is no power to sell except by auction, it is necessary to explain that the requirements of the power have been satisfied; but even then all reference to the particulars and conditions should, for the reason given above, be avoided. The description of the property to be conveyed should also be given in the

(*p*) *Ante*, p. 138.

recital in general terms, such as "the hereditaments hereinafter described and hereby conveyed," as otherwise, in case of any discrepancy between the recital and the description of the "parcels," the effect of the operative part might be held to be limited or controlled by the recital: see *ante*, p. 130. Recitals.

If timber or fixtures or other matters which pass with the freehold be taken at a valuation, they will not be referred to (except in cases where the fact that the sale has been by auction is recited), and the sale and purchase will be represented as having been at an entire price. Timber, fixtures, deposit, &c.

Custom has sanctioned a distinction in the mode of framing a recital of a sale and purchase, to which attention should be drawn. Where both parties to the transaction are *sui juris*, and able to deal with one another directly, or if both are exercising powers or trusts, it is immaterial whether the transaction be described as a sale or as a purchase. Where one party is acting under a power or a trust, the transaction will be recited as a sale or a purchase, according as his power or trust is to sell or purchase. Recitals of agreements for sale or purchase.

Where under sect. 53 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a deed is intended to be supplemental to a principal deed, or is directed to be read as an annex thereto, the names of the parties will be followed by a recital or statement defining the relation of the secondary and principal indentures, and setting forth that the indenture in question is supplemental, or to be read as an annex to a principal indenture. Supplemental deeds, &c.

There will be no recitals in a deed indorsed, or in a supplemental deed, or in a deed directed to be read as an annex to another deed, except of facts and instruments subsequent in date to the principal deed. Recitals in indorsed, supplemental, and annexed deeds.

4. The Consideration.

Statement of Consideration.]—After the recitals (if any), or if there be no recitals, then immediately after the parties, follow the witnessing parts of the deed, which, after referring to any agreement or Statement of the consideration.

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motive, recited in the introductory recital, usually proceed to state the consideration for the assurance effected or evidenced by the deed. This order of arrangement is sanctioned by custom; it seems to be logically correct, and is certainly convenient. But this collocation is not necessary: it is sufficient if the consideration be indicated somewhere within the deed: *Thomas* v. *Thomas*, 2 G. & D. 226. A consideration is necessary to the validity of a simple contract; but the fact that the instrument is a deed is of itself enough to support the contract which it embodies; thus, no consideration is needed to support a covenant by deed; nor is a consideration necessary to support a use, if a use be declared; but if a use be not declared, a consideration is necessary to raise one: *Ward* v. *Tuddington*, 2 Roll. Abr. 783; *Garnish* v. *Wentworth*, Carth. 137; *Sir C. Hatton's Case*, Vin. Abr., *Uses* (H), pl. 8; but where there is a declared use, the absence of any consideration, or the statement of a consideration not consistent with the use as declared will not affect the use: Perk. s. 537; *Calthorpe's Case*, Moor. 102; *Villers* v. *Beaumont*, 1 Rep. 176 b.

If the consideration be future or contingent and afterwards fail, this will not avoid the deed; Co. Lit. 204 a.

Reasons for stating consideration.

It is nevertheless important that the consideration should appear in the deed for several reasons.

It should appear by the deed that it is not a voluntary conveyance.

First. It is important that the deed should appear not to be a voluntary conveyance; otherwise it may be liable to be defeated in favour of a subsequent purchaser for valuable consideration without notice, or of creditors of the grantor, under the statutes 13 Eliz. c. 5, or 27 Eliz. c. 4. As to the difficulties involved in a title deduced under a voluntary conveyance, see the judgment of *Cleasby*, B., in *Clarke* v. *Willott*, L. R. 7 Ex. at p. 318. Extrinsic evidence may, however, be adduced in order to prove the actual consideration of a deed; and a deed which appears to be a voluntary conveyance may by this means be shown to be in fact a conveyance for valuable consideration: *Ferrars* v. *Cherry*, 2 Vern. 384; *Pott* v. *Todhunter*, 2 Coll. 76;

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Thompson v. *Webster*, 4 De G. & J. 600; 7 Jur. N. S, 531; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; *R.* v. *Inhabitants of Scammonden*, 3 T. R. 474; *Harman* v. *Richards*, 10 Ha. 81; *Townend* v. *Toker*, L. R. 1 Ch. 446; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228. So, also, when a pecuniary consideration is alleged in the deed, it may be proved that it was based also on the consideration of marriage: *Mildmay's Case*, 1 Rep. 176; *Villers* v. *Beaumont*, Dyer, 146 a; *Tull* v. *Partlett*, M. & Mal. 472; and, at all events, in cases where third parties are interested, such third parties may prove the consideration to have been of a different amount from that specified in the deed: *R.* v. *Scammonden*, 3 T. R. 374; *R.* v. *Lllangunnor*, 2 B. & Ad. 616; *Frail* v. *Ellis*, 16 Beav. 350. But where it is attempted to show that the actual consideration was not that which appears on the face of the deed, the alleged consideration must not be inconsistent with the consideration stated in the deed: Shep. Touch. 510; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 149, and 9 Jur. 633; *Nixon* v. *Hamilton*, 2 Dr. & W. 385; *Townend* v. *Toker*, L. R. 1 Ch. 459. It would, however, be highly imprudent to trust to this means of establishing the validity of a deed. When a conveyance, which on the face of it is voluntary, is attempted to be set up as having been made for valuable consideration, the onus of proof of such consideration rests with the party attempting to set it up: *Kelson* v. *Kelson*, 10 Ha. 385; see *Coultwas* v. *Swan*, 19 W. R. 485.

Where a consideration is necessary to raise a use.

Secondly. Where no use is declared, a consideration is necessary to raise a use in favour of the grantee. Thus, in conveyances by bargain and sale, a consideration is necessary, and it is necessary that it should be so stated as to show that it moves from the grantee to the grantor, in order to secure that the deed shall have its intended effect. And the consideration must be money; but any pecuniary consideration, no matter how small, will be sufficient for the purpose; and the bargainor will immediately upon execution of the deed become seised to the use of the bargainee (in whose favour the use is raised by the

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consideration), and the use is executed in the bargainee by the Statute of Uses. But parol evidence is admissible to prove that where in a deed operating under the statute, no consideration is mentioned, a consideration was in fact given : *Mildmay's Case*, 1 Rep. 176.

Requirements of the Stamp Act as to statement of consideration.

Thirdly. The Stamp Act, 1870 (33 & 34 Vict. c. 97), sect. 10, requires that the consideration be truly set forth under a penalty of 10*l.* (*q*). If the consideration be not stated, the instrument is not void, but the parties and those responsible for its preparation are liable to the prescribed penalties : see *Robinson* v. *Macdonnell*, 5 M. & S. 228 ; *Duck* v. *Braddyl*, 13 Pri. 455 ; *Doe* d. *Kettle* v. *Lewis*, 10 B. & C. 673.

Statement of consideration in bills of sale.

Valuable and good consideration.

Considerations are usually divided into valuable considerations and good considerations. A valuable consideration has been defined as a cause or meritorious occasion, requiring a mutual recompense in fact or in law : 3 Dyer, 336 a ; and is said to move from the person who gives the consideration, or is incommoded by it. The learning with respect to the different kinds of consideration is of considerable importance in connection with settlements, and reference in this connection may be made to a subsequent volume of this work (*r*). It may suffice in this place to remark that only such purchase deeds as operate as covenants to stand seised, can be supported by a good consideration against a subsequent purchaser for value. In order to take ordinary purchase deeds out of the operation of the Statutes of Elizabeth, above referred to, a valuable consideration is necessary.

Consideration usually stated in words, not figures.

It was also necessary under a former Stamp Act (48 Geo. 3, c. 149, s. 22), that the consideration

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(*q*) These penalties were formerly much more severe than at present : see 48 Geo. 3, c. 149 ; 55 Geo. 3, c. 184 ; *Att.-Gen.* v. *Brown*, 3 Exch. 662 ; *Boone* v. *Mitchell*, 1 B. & C. 18. Moreover, the purchaser was entitled to recover so much of the consideration as was not stated : see *Gingell* v. *Parkins*, 4 Exch. 720. These penalties, however, did not apply to cases of exchange : *Henniker* v. *Henniker*, 1 E. & B. 54.

(*r*) See *post*, sub tit. SETTLEMENTS.

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money should be stated at length in words. This seems to be no longer necessary; but the custom is still continued, partly no doubt in continuance of the former compulsory practice, but partly also because there is less liability to mistake if the amount be stated in words than if it be set out in figures.

Description of valuable consideration.

It was formerly customary always to define the nature of the currency in which the consideration was paid. There was a clear advantage in this at a time when the currencies of the different parts of the United Kingdom varied, but, so far as regards ordinary transactions with property within the United Kingdom, there seems, at the present time, no need to do more than describe the consideration as so many pounds, shillings, and pence; which, in the absence of any declaration or evidence to the contrary, will be assumed to be money of the denominations and values current in the United Kingdom. In the case of a purchase of foreign or colonial land it is necessary to define the consideration money, if it be money current within these realms, by the appropriate designation, and the proper mode is to describe it by the epithet "sterling." In some cases the consideration is a sum of stock. This must be accurately described by its proper technical description.

In cases where there is no consideration, or where the consideration is only "good," it is usual to set forth that the deed is made for "divers good considerations." It was also formerly the custom, where there were more than one conveying or confirming parties, to state that to those who did not receive the actual consideration, was paid a nominal consideration of five or ten shillings. The latter of these common forms was certainly useless, and in some cases, as that of a bargain and sale, enrolled under the Statute of Uses, or under 3 & 4 Will. 4, c. 74 (see sect. 41), might, if it had had the effect of a pecuniary consideration, have frustrated the intention of the parties: it has now become obsolete. The former, though still not uncommonly used, seems to be of no practical value, except where there is a covenant to stand seised, or where no use is declared.

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Consideration payable by instalments.

The consideration will be usually either a sum in gross payable in one sum, or in instalments, or a rentcharge. Where the price is payable in one sum at one time, it will be mentioned as having been paid on the execution of the conveyance. Where it is payable in instalments, it would be prudent in the vendor not to convey until the last instalment is paid; when the consideration will be referred to in the same way as if it had been a lump sum payable at the date of the conveyance in the usual way; or, if the conveyance be made when the first instalment is paid, the vendor should take a mortgage by a contemporaneous deed, to secure the payment of the remaining instalments, and in the conveyance the whole purchase-money will be represented as having been paid at the date of the conveyance. Where neither of these courses is adopted, it would appear that a vendor who has sold in consideration of a sum payable in instalments, retains a lien upon the estate for the unpaid instalments, and he will be able to obtain from the courts a declaration of his lien, with liberty to apply as each instalment becomes due: *Nives* v. *Nives*, 15 Ch. D. 649; as to when the purchaser may succeed in excluding the vendor's lien: see *Re Brentwood Brick and Coal Co.*, 4 Ch. D. 562.

Rentcharge.

Where the conveyance is in consideration of a rentcharge or perpetual fee farm rent, the statement of the consideration will correspond in form with the statement of consideration in leases: as to which see *ante*, Vol. III., tit. LEASES, p. 128. It may here be noted that fiduciary vendors cannot sell for a rentcharge or annuity: see *Read* v. *Shaw*, Sug. Pow. p. 864, and *Reid* v. *Shergold*, 10 Ves. 380. Under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 78, ss. 10 and 11), the persons deriving their power to sell from the Act are enabled to sell for a gross sum only: but, by the Amendment Act (23 & 24 Vict. c. 106, s. 2), any person selling under the powers of the Acts may sell for a rentcharge. But this power appears not to be given to tenants for life selling under the Settled Land Acts, 1882.

Statement of

It is usual where the deed contains more than one

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consideration where there are several witnessing parts.

witnessing part, to set forth the whole consideration for the conveyance in the first of the witnessing parts, a reference to the consideration so stated being added in each subsequent witnessing part. The practice is convenient, and in most cases accurate and applicable. Cases do sometimes occur, however, in which this is not suitable: in such cases the consideration for each of the several transactions carried out in each of the witnessing parts is sometimes mentioned separately. It will, however, as a general rule, be found more convenient to adhere to the usual practice of stating all the considerations for the deed in the first witnessing part, even in cases where such adherence may not be strictly accurate.

Apportionment of consideration.

Under the old Stamp Act (55 Geo. 3, c. 84) it was sometimes possible to save a part of the duty, by apportioning the purchase-money on a purchase of freeholds and copyholds: see *Clark* v. *May*, 16 Beav. 273. But, under the present Stamp Act (33 & 34 Vict. c. 97) this seems to be no longer possible. There is, therefore, now no occasion to apportion the purchase-money between different classes of property, unless there be something special in the circumstances which renders it advisable. So also where land is being conveyed with timber thereon, the whole will be conveyed at one price, even though the timber may have been valued at a distinct sum, and purchased separately from the land. And in the case of sales by auction, it is usual to take no notice in the conveyance of the fact that the deposit was paid to the auctioneer before the payment of the rest of the purchase-money; but the whole amount of the purchase-money is stated as the consideration for the sale, and is treated as being paid to the vendor in one sum at one time.

But where the purchase-money is payable to different persons, it must, of course, be apportioned as between them. For instance, where the conveyance is made by a mortgagor and his mortgagee, the consideration will be expressed to be paid as to one part to the mortgagee, and as to the remainder to the mortgagor; the payment to the mortgagee

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being mentioned first. So also where a lessee surrenders a valuable lease in consideration of his receiving a part of the purchase-money. The same course is, if possible, more necessary where one of the vendors is a trustee or a set of trustees. Where this is the case, the apportionment must be made beforehand: see *Morris* v. *Debenham*, 2 Ch. D. 540, and *Re Cooper and Allen's Sale to Harlech*, 4 Ch. D. 802; which cases should be considered with regard to the propriety of trustees joining with others in a sale of property, and to the proper mode of appropriating purchase-money in such cases.

Inadequate consideration.

Mere inadequacy of consideration will not avoid the purchase of an estate or interest in possession, unless the transaction is shown to be the result of fraud, misrepresentation, or surprise: *Pickett* v. *Loggon*, 14 Ves. 215; *Reynell* v. *Sprye*, 1 De G., M. & G. 660; but inadequacy of consideration may be so great as of itself to amount to evidence of fraud: *Drought* v. *Easton*, 1 Moll. 328; *Rice* v. *Gordon*, 11 Beav. 265; *Abbott* v. *Sworder*, 4 De G. & S. 448; *Haygarth* v. *Wearing*, L. R. 12 Eq. 320; see also Sugd. V. & P. 244; Dart, V. & P. 747; see also *Vigers* v. *Pike*, 8 Cl. & F. 645; *Wilde* v. *Gibson*, 1 H. L. C. 617; *Playford* v. *Playford*, 4 Ha. 546.

As regards purchases of reversionary interests, inadequacy of consideration was of itself a sufficient ground for setting aside a contract, or decreeing a reconveyance: see *Wiseman* v. *Beake*, 2 Vern. 121; *Coles* v. *Trecothick*, 9 Ves. 246; except in cases of family arrangements between fathers, tenants for life, and sons tenants in tail: *Tweddell* v. *Tweddell*, T. & R. 13; *Lord Aldborough* v. *Trye*, 7 Cl. & F. 436; or where the sale was by public auction: *Shaw* v. *Nash*, 3 Mad. 232. But by the Sales of Reversions Act (31 Vict. c. 4) it is provided that no purchase made *bonâ fide*, and without fraud or unfair dealing shall be opened or set aside merely on the ground of undervalue. Sales of reversionary interests are thus placed on the same footing as sales of interests in possession and both alike may be set aside if the bargain was unconscionable.

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See as to unconscionable bargains, *Earl of Chesterfield* v. *Jansen*, 2 Ves. sen. 125, and the notes to that case in 1 Wh. & T. L. C. Eq. 624 *et seq.*; see also *Tyler* v. *Yates*, L. R. 6 Ch. 665; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Beynon* v. *Cook*, L. R. 10 Ch. 389; *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814; *Nevill* v. *Snelling*, 15 Ch. D. 679.

Vendor's lien.

When a vendor executes a conveyance without having received the whole of the purchase-money, he has a lien upon the land for the sum which has not been paid to him. This lien may be enforced by a sale of the property for the purpose of raising the amount due to him. Though the vendor is not prevented by the receipt from enforcing his lien, it will be prudent in such cases to omit the receipt from the body of the deed, and to indorse upon it a receipt for the purchase-money as and when it is paid. The vendor may waive his lien either by the terms of his conveyance, as in *Re Brentwood Brick and Coal Co.*, 4 Ch. D. 562, or he may waive it by his conduct, as, for instance, in certain circumstances, by allowing the purchaser to register the conveyance in a register county: *Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 Ch. D. 501. Where land is taken under the Lands Clauses Consolidation Act, 1845, the vendor has a statutory lien for the purchase-money: see 8 Vict. c. 18, s. 34. The lien is enforceable by sale, or where the undertaking has been carried out and is in operation, by the appointment of a receiver: *Walker* v. *Ware, Hadham and Huntingford Rail. Co.*, L. R. 1 Eq. 195; *Way* v. *Tottenham and Hampstead Junction Rail. Co.*, L. R. 3 Ch. 740; *Pell* v. *Northampton and Banbury Rail. Co.*, L. R. 2 Ch. 100; *Lycett* v. *Stafford and Uttoxeter Rail. Co.*, L. R. 13 Eq. 261; and where land is sold in such cases, it is discharged from all claims of the public to use it as a highway: *Munns* v. *Isle of Wight Rail. Co.*, L. R. 8 Eq. 653; L. R. 5 Ch. 414. See further as to vendor's lien, *ante*, sub tit. MORTGAGES, Vol. III. pp. 651 *et seq.*

Receipt clause.

Receipt Clause.] — Immediately following the

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statement of the consideration and its payment to the vendor or other parties entitled to receive it, comes the receipt. This is now usually confined to a plain statement that the parties receiving the money acknowledge the receipt thereof, the amplifications formerly used being now dispensed with.

Indorsed receipt.

In addition to the receipt in the body of the deed it was usual to add a formal receipt on the back of the deed. This additional receipt was of importance, and any unusual circumstance in connection with it was considered sufficient to raise suspicion as to the transaction to which it referred: *Kennedy* v. *Green*, 3 My. & K. 699; *Lynn* v. *Chaters*, 2 Keen, 521. But the necessity for the indorsed receipt is now removed by the 54th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts that:—

Receipt in deed sufficient.

"(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

"(2.) This section applies only to deeds executed after the commencement of this Act."

The receipt in the body of the deed formerly, in law, estopped the vendor from proving that the purchase-money was not actually paid: *Fawcus* v. *Porter*, 3 Car. & K. 309; *Baker* v. *Dewey*, 1 B. & C. 704; *Rowntree* v. *Jacob*, 2 Taun. 141; *Harding* v. *Ambler*, 3 M. & W. 279; provided that the fact of payment was clearly stated: *Lampon* v. *Corke*, 5 B. & Al. 606; *Wilson* v. *Keating*, 28 L. J., Ch. 895. The receipt for the consideration-money, however, usually indorsed upon the deed, and signed by the vendor, not being under seal, worked no estoppel; and therefore, if the deed itself did not, though the indorsed receipt did, distinctly state the payment of the consideration-money, a party was not concluded from proving the contrary: *Lampon* v. *Corke*, 5 B. & Al. 606; *Bottrell* v. *Summers*, 2 Y. & J. 407. In equity, neither the receipt in the body of the deed nor the

Receipt indorsed not conclusive at law.

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indorsed receipt had any such effect, but the vendor is at liberty to show that the money was in fact not paid, and retains his lien upon the estate, as against the purchaser, and all claiming under him with notice of the non-payment: *Coppin* v. *Coppin*, 2 P. Wms. 291; *Hughes* v. *Kearney*, 1 Sch. & L. 132; *Grant* v. *Mills*, 2 Ves. & B. 306; *Hawkins* v. *Gardiner*, 2 Sm. & G. 441; *Kennedy* v. *Green*, 3 My. & K. 699; *Teed* v. *Carruthers*, 2 Y. & C. C. C. 40; *Deverell* v. *Whitmarsh*, 5 Jur. 963 (a case of a payment by cheque subsequently dishonoured); *Greenslade* v. *Dan*, 20 Beav. 284; *Ryle* v. *Haggie*, 1 J. & W. 234. In these cases the question arose as between the vendor and his purchaser; but as between the vendor and a purchaser from the original purchaser, it was held that where a purchaser finds a receipt, in usual form, indorsed upon a conveyance, there is no occasion for him to inquire further: *White* v. *Wakefield*, 7 Sim. 401; and compare *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18; *Winter* v. *Lord Anson*, 3 Russ. 493; and *Kennedy* v. *Green*, 3 My. & K. 699; where it was held that the subsequent purchaser was affected, through his solicitor, with notice that the purchase-money had not been paid. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 4), enacts as follows:—

Receipt in deed or indorsed evidence for subsequent purchaser.

Sect. 55. "(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

"(2.) This section applies only to deeds executed after the commencement of this Act."

It will be observed that the section protects only a subsequent purchaser who has no notice of the non-payment of the consideration; and it may be doubted whether it carries the protection of the purchaser further than it stood before; that is, whether the second purchaser employing the same

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solicitor as the first purchaser, would not be affected with notice so as to take him out of the scope of the section.

Constructive notice.

The doctrine of constructive notice has, however, been modified by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 3 of which enacts as follows :—

"(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless—

"(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or,

"(ii.) In the same transactions with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

"(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

"(3.) A purchaser shall not by reason of anything in these sections be affected by notice in any case where he would not have been so affected if this section had not been enacted.

"(4.) This section applies to purchases made either before or after the commencement of this Act: save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section."

Whether the expression "the same transaction" will cover the case of the same solicitor acting for two successive purchasers must remain uncertain until it has been judicially determined to what circumstances that expression is to be applied; probably the length of time elapsing between the two purchases would have a material influence upon the decision.

Consideration.

In whichever way this point may be decided, the net effect of sects. 54 & 55 of the Conveyancing and Law of Property Act, 1881, seems to be to do away entirely with the endorsed receipt in ordinary cases. It has, however, been suggested that the endorsed receipt may still be useful in cases where the vendor is a corporation, accustomed to give receipts signed by some one of its officers; and also, that where the purchase-money is paid subsequently to the delivery of the deed, the receipt will be omitted from the body of the deed, and, upon payment, a receipt in usual form will be endorsed.

Authority to solicitor to receive purchase-money.

The view of *Turner*, L. J., that a written authority to receive purchase-money should be given to the vendor's solicitor where it is intended that he shall receive the purchase-money: *Viney* v. *Chaplin*, 2 De G. & J. 468, which was approved by *Brett*, L. J. in *Ex parte Swinbanks*, 11 Ch. D. 525, has been set aside by sect. 56 of the Conveyancing and Law of Property Act, 1881 (*s*), which provides that the production of a deed containing a receipt executed, or an endorsed receipt signed by the person entitled to give a receipt for the consideration, shall give authority to the solicitor producing the deed to receive the money. The effect of this section is to restore the law to the condition in which it was generally supposed to be prior to the case of *Viney* v. *Chaplin*, but so far as regards trustees, it makes no alteration in their position; trustees are still, except under special circumstances, incapacitated from enabling their solicitor to receive purchase-money on their behalf: *Re Bellamy & The Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower & Metropolitan Board of Works*, 27 Ch. D. 592; and see *ante*, Vol. II., tit. Conditions of Sale, p. 646.

5. The Operative Words.

The operative words follow next after the statement of the consideration and the receipt clause. They are the words which express the act per-

(*s*) See the section set out at length, *ante*, Vol. II., tit. Conditions of Sale, p. 646.

Operative Words.

formed by the deed, and by virtue of which the estate passes, or the agreement is made, or the covenant is entered into.

Operative words.

The Conveyancing and Law of Property Act, 1881, has had considerable influence on the use of operative words. It enacts :—

> Sect. 49. "(1.) It is hereby declared that the use of the word 'grant' is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.
>
> "(2.) This section applies to conveyances made before or after the commencement of this Act."

Meanings of various operative words.

Originally, the operative words which were used all had their distinctive meanings and appropriate uses. These words are enfeoff, proper to be used in a feoffment ; grant, applicable to the conveyance of freehold hereditaments of every kind not lying in livery ; release, appropriate to the conveyance to the person in possession of the remainder expectant on his estate ; alien and assure, the most general words of conveyance ; bargain and sale, which operated either under the Statute of Uses, to vest the legal estate in the bargainee, or at the common law, in exercise of a common law power of sale ; and confirm, which, though properly suitable only to cases of actual confirmation of a previous conveyance, was generally used without distinct reference to its proper meaning.

"Release."

"Grant."

So long as conveyances were effected by lease and release, the word most frequently in use was "release." But by the 8 & 9 Vict. c. 106, s. 2, it was provided that all corporeal hereditaments should, as regarded the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as livery. The effect of this enactment has already been pointed out (*ante*, p. 10), but it also operated to make the word grant, the customary word of assurance. This word is also, in certain cases, useful and proper to be used, as where, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), sect. 52, it implies covenants for title.

"Convey."

It is probable that no particular word would be absolutely essential to the effectual transfer of pro-

Operative Words.

perty, but that any phraseology which would clearly indicate the intention to convey property would be sufficient: *Chester* v. *Willan*, 2 Wms. Saund. 96 a (1); *Shove* v. *Pincke*, 5 T. R. 124; *Doe* d. *Daniel* v. *Woodroffe*, 10 M. & W. 608. But since the enactment in the Conveyancing and Law of Property Act, 1881, above quoted, it seems likely that the word "convey" will come into general use as the widest term that can be employed for the purpose. This seems the more probable, because it is the word used throughout the Act; and, according to a strict construction of the Act, is the word which, on certain conditions, carries the implied covenants.

"Dispose of."

Where a married woman is conveying, the term "dispose of" is commonly used, that being the word employed in the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), sect. 77, by which the power of disposition is given to her.

"Assign."

In the conveyance of chattels, whether real or personal, the proper word to use is "assign"; but it is probable that this word also will be supplanted by the more general term "convey."

"Appoint."

Where a deed operates in exercise of a power, the proper operative word is "appoint."

Implied covenants for title.

The operative words will, under sect. 7 of the Conveyancing and Law of Property Act, 1881, be qualified by the addition of technical words indicating the character in which the person who is conveying is intended to convey, with the object of securing the benefit of the implied covenants specified in that section. Thus on a conveyance of land or chattels, the vendor will convey "as beneficial owner;" a trustee will convey "as trustee," and so forth; see *post*, p. 222.

Operation of operative part.

The operative part may operate doubly, so as to pass two distinct estates in the subject-matter. In *Burton* v. *Barclay*, 7 Bing. 760, where the same operative words were held to pass a chattel reversion for years, and also the reversion in fee simple, "The general rule is," said *Tindal*, C.J., "that deeds are to be construed, if possible, so as to effectuate the intention of the parties, and no authority has been brought before us to show that, where a

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double purpose is intended, and the words are large enough, such double purpose may not be carried into effect."

6. The Parcels.

The parcels.

Description of Parcels.]—Immediately after the operative words and the mention of the grantee follows the description of the property intended to be conveyed. This description is technically called the "parcels."

The description of the property in the parcels may be either in express and particular terms, or by reference to a description given in a schedule, or in the recitals or elsewhere in the same instrument, or in another instrument. The most usual practice in framing purchase-deeds is to insert a full particular and detailed description of the property in the parcels in the witnessing part of the deed, after the operative words (*t*). The property, when mentioned in the recitals and other parts of the deed, will be referred to as the "hereditaments hereinafter described," or "the premises hereby conveyed," or by some similar phrase appropriate to the circumstances. And sometimes where a deed purports to convey property the title to different parts of which is derived under different recited instruments, such property may be conveniently referred to in the recitals as "the hereditaments first (or secondly, thirdly, or as the case may be) hereinafter described," and the witnessing part will contain a corresponding conveyance of "First, all that, &c., secondly, all that, &c.," and so on. It is important that the terms of reference should be consistent with the description given in the parcels, and that the form of words adopted should be adhered to without variation throughout the deed. Confusion and even serious question may arise, if the draftsman in one part of the instrument refers to the property as "messuages and lands" and elsewhere as "farms and heredita-

(*t*) As to the parcels in assignments of leaseholds, *post*, p. 176.

ments" or "tenements and premises" (*u*). Where there is more than one witnessing part it will only be necessary to insert a particular description of the property in one of such parts, and in the other witnessing parts it will be sufficient to mention the parcels by reference to that description. Parcels.

If one of several witnessing parts is clearly the principal, the others being merely subsidiary, the parcels will be particularly described in such principal part. Otherwise the best course will probably in most cases be to give the particular description in the first witnessing part; but no definite rule can be laid down on this point, the question is entirely one of convenience.

The mode of describing the parcels will vary according to the nature of the property. The particulars generally given in order to identify the property are the situation, boundaries, occupation, dimensions, and distinctive name, if any. In respect to all these matters it is important to avoid mistakes: *Lambe* v. *Reaston*, 5 Taunt. 607; *Wrottesley* v. *Adams*, Plow. 191; see *Rorke* v. *Errington*, 7 H. L. C. 617; *Jack* v. *M'Intyre*, 12 Cl. & F. 151; *Francis* v. *Hayward*, 22 Ch. D. 181. Houses in towns, &c., will usually be described as situate on a particular side of the street, square, or road on which they front; the dimensions of the property may be given in linear or square measure in feet or yards, or by reference to an annexed or indorsed ground plan, as may be most convenient; the distinctive number, if any, of a town house should be stated, and in that case it will generally be unnecessary to state the boundaries. In the case of conveyances of houses and lands in the country, the situation will be described by stating the parish or parishes and county, and it will generally be advisable to state the boundaries as precisely as possible; Mode of describing parcels.

(*u*) In a conveyance of real estate the word "hereditaments" will be generally a sufficient term of reference in the recitals, and, in all cases, the word "premises" will be sufficient and convenient for the purpose, after the property has been once particularly described: see *ante*, p. 22.

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the acreage of the property will also be stated. In describing parcels by the boundaries and situation, reference may be made to the abuttals upon other property, and the names of the owners of adjoining property; and also to a plan or map. Formerly the tithe commutation map (*x*) was of great service as a means of description of property, and maps annexed to inclosure awards were frequently used for this purpose; but the changes of ownership and the division of property since such plans were made have caused them to be less useful now. The map of the Ordnance Survey will probably take their place in this respect. When property is described by reference to its tenancy, or occupation, there are certain niceties of expression which are useful to remember: thus, where land is actually in the occupation of A.B., it will be described as being "now in the occupation of A.B. as tenant thereof;" when the present and last occupiers are referred to, the description will run, "late in the occupation of C.D. but now of A.B.;" but when there have been other tenants between C.D. and A.B., the proper wording is, "formerly in the occupation of C.D., but now of A.B."

Construction of descriptions of parcels; "parcel or no parcel."

The question of "parcel or no parcel" is for the jury, but the judge is bound to explain to the jury, for their guidance, what is the true construction of any documents necessary for the decision of the question "parcel or no parcel": *Lyle* v. *Richards*, L. R. 1 H. L. 222. The rule of construction as applicable to the parcels of a deed appears to be that if the language used in the actual description in the usual place in a deed is sufficiently clear and definite to give an intelligible meaning, any further particulars, inconsistent with such meaning, will be regarded as *falsa demonstratio*, and rejected accordingly. The description contained in the parcels

(*x*) A tithe commutation map of the parish in which property is situated is not, under the stat. 6 & 7 Will. 4, c. 71, s. 64, admissible in evidence to show the boundary of the property in a case of disputed title: *Wilberforce* v. *Hearfield*, 5 Ch. D. 709. And as to the admission of maps generally as evidence, see *Bidder* v. *Bridges*, 54 L. T. 529; 34 W. R. 514.

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may refer to a map or schedule, which must be taken as a part of the description itself, for *verba illata inesse videntur: Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183. If these different parts of the same description are not consistent, the part which is definite and gives an adequate designation of the identity will be accepted and the remainder rejected. If, on the other hand, the description so furnished is not sufficiently definite, the recitals and other parts of the deed may be searched for indications of the intentions of the parties; and in cases where adequate information can be thus gleaned from within the four corners of the deed, the recitals or other parts of the deed will be allowed to override the parcels or schedule. Lastly, if the circumstances are such that the description thus furnished cannot be properly identified with the parts of the property, evidence *dehors* the deed will be admissible to show what was actually intended by the parties.

Falsa demonstratio.

First, as to rejection, where there is a clear and definite description of the parcels, of words inconsistent therewith.

Occupancy.

Parcels are frequently described with reference to the name of the present or late tenant. It is important that accuracy should be secured in this respect. No doubt, when the statement is manifestly incorrect, it may be rejected. Thus it is said, "if one grant in this manner 'all my manor of W., late parcel of the possession of the Abbot of S., and late in the possession of K.,' and in truth it never was in the possession of K., this grant is good notwithstanding": Shep. Touch. 247; see *Wrotesly* v. *Adams*, Plow. 191; *Windham* v. *Windham*, Dy. 376 f.; *Swyft* v. *Eyres*, Cro. Car. 546; *Wilkinson* v. *Malin*, 2 Cr. & J. 636; *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43. On the other hand the words referring to the occupation may appear to be an essential part of the description, and in such cases they will be held to control the rest of the description of the parcels: *Ognel's case*, 4 Rep. 486; *Dyne* v. *Nutley*, 14 C. B. 122; *Morrell* v. *Fisher*, 4 Exch. 591; *Magee* v. *Lavell*, L. R. 9 C. P. 107.

Description

When the property to be conveyed consists of

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by reference to schedule and plan.

several houses or pieces of land, it is a common and convenient practice to describe the property in general terms in the parcels, and to add that it is more particularly delineated in a plan referred to, and more particularly described in a schedule to the deed; and the schedule itself may be made to refer to the plan by distinguishing numbers. When this course is adopted special care should be taken to make the description in the schedule definite and precise, and to see that the descriptions in the two places are consistent; and care should be especially taken to see that the delineation on the plan does not in any respect contradict the description which refers to it. Otherwise serious questions may arise as to what passes or does not pass by the deed. Thus in *Barton* v. *Dawes*, 10 C. B. 261, the parcels were described as a specified farm; but the schedule and plan to which the parcels referred did not include a close which was proved to have been held with and treated as part of the farm; and the Court decided that this particular close did not pass: see *Wood* v. *Rowcliffe*, 6 Exch. 407. On the other hand, where the description in the body of a bill of sale specified all the chattels of the grantor "which are more particularly described in the schedule," but the schedule contained descriptions of some only of his chattels, it was held that the whole passed: *Baker* v. *Richardson*, 6 W. R. 663; *Cost* v. *Jagar*, 3 H. & N. 370. See also *Ex parte Jardine*, *Re McManus*, L. R. 10 Ch. 322; *Sumner* v. *Schofield*, 43 L. T. 763. In *Howard* v. *Earl of Shrewsbury*, L. R. 17 Eq. 378, the question arose under an Act of Parliament giving powers of sale and exchange over settled lands. The Act vested in trustees all and singular the lands in certain counties limited by a previous settlement and Act, which were described in the schedule. The schedule enumerated lands which were in those counties but not included in the former settlement and Act: it was held that these lands did not pass: cf. *Jenner* v. *Jenner*, L. R. 1 Eq. 361.

Similarly, in the case of plans, the question is which of the descriptions is clear and precise. Thus,

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in *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183, the parcels referred to a schedule, and the schedule described one plot as No. 153 b on a particular plan, and added that it contained 34 perches. The plan, however, showed that the plot contained 27 perches only; and it was held that the 27 perches only passed by the deed. The Court rejected the description in the schedule, "containing 34 perches," as *falsa demonstratio*, explaining the maxim that *falsa demonstratio non nocet* (*y*) thus: "as soon as there is an adequate and sufficient description, with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it." In *Willis* v. *Watney*, 51 L. J. Ch. 181 (stated *infra*, p. 185), the yard as to which debate arose would have been excluded from the deed had the matter rested upon the parcels and the plan. So in the case of *Lyle* v. *Richards*, L. R. 1 H. L. 222, the description in the body of the deed was such as to admit of a boundary line being drawn from either the north-east or south-east corner of a house; in the plan the line was drawn from the north-east corner, and it was held that the boundary line must be taken to be the line drawn from that corner.

A plan which is attached to, but is not referred to in the conveyance, cannot be used in order to explain it: *Wyse* v. *Leahy*, Ir. R. 9 C. L. 384; nor will a plan, so small and indistinct as to be of no service in determining boundaries, be allowed to control the words of the deed: *Taylor* v. *Parry*, 1 M. & Gr. 604. See also *Barlow* v. *Rhodes*, 1 Cr. & M. 439; *Re Otway's Estate*, 13 Ir. Ch. R. 222.

(*y*) The strict meaning of this maxim has been stated to be that when in reading the description of the parcels of a deed there is found a clear and definite description which applies to a distinguishable subject, every word which follows may be treated as irrelevant and mere surplusage: see and compare Shep. Touch. 247; *Morrell* v. *Fisher*, 4 Ex. 604; *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 51; *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 189; *Kingstown Rail. Co.* v. *Bradford*, 7 Ir. Ch. Rep. 63; *Roe* d. *Conolly* v. *Vernon*, 5 East, 51; *West* v. *Lawday*, 11 H. L. C. 384; *Pedley* v. *Dodds*, L. R. 2 Eq. 819; but see *Dowtie's case*, 3 Rep. 9 b; *Rorke* v. *Errington*, 7 H. L. C. 617.

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Reference to recitals, &c., to explain intention of parties, when description of parcels is ambiguous.

Secondly, if the description contained in the parcels and any schedules or plans be insufficient to identify the property, resort may be had to the recitals or other parts of the deed, if these throw any light upon the subject. Thus, where the parcels of a settlement extended to all the settlor's property, a recital that it was intended to settle all the settlor's property in a particular county was allowed to restrain the wider words in the operative part: *Jenner* v. *Jenner*, L. R. 1 Eq. 61; see also *Walsh* v. *Trevannion*, 15 Q. B. 733; *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Barratt* v. *Wyatt*, 30 Beav. 443; *Gwyn* v. *Neath Canal Co.*, L. R. 3 Ex. 209; and *ante*, p. 130 *et seq.* On the other hand, where the description in the parcels is clear and definite, a recital inconsistent therewith will not be allowed to vary it.

For some remarks on the question what will pass by a deed without special mention, see *infra*, p. 191.

Parol evidence, when admissible to explain deed.

Lastly, as to the admissibility of extrinsic evidence to show the intention of the parties, oral evidence cannot, as a general rule, be called in to explain or vary the statements of a deed as to the property therein comprised, for it is a rule of law that when a contract is reduced to writing the result must be taken as the final expression of the intention of the parties, and extrinsic evidence cannot be employed to explain the intention as having been different from what appears upon the face of the deed. Oral evidence may, however, be admissible to prove the condition of the property and of every part of it: *Baird* v. *Fortune*, 4 Macq. 127; *Magee* v. *Lavell*, L. R. 9 C. P. 107.

So also in the case of a lease, where a lessor was suing a tenant for having ploughed up land described in his lease as "meadow," it was held that he was not estopped by the description from proving that it was in fact arable: *Skipwith* v. *Green*, 1 Stra. 610; cf. *S. C.*, Bac. Abr. *Pleas; Jack* v. *M'Intyre*, 12 Cl. & F. 151; *Manning* v. *Fitzgerald*, 29 L. J. Ex. 24. Or, again, oral evidence is admissible to prove mistake: *Hutchins* v. *Scott*, 2 M. & W. 816; *Mortimer* v. *Shortall*, 2 Dru. & W. 363. If the mistake is common to both parties, the Court will interfere

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(*Shelburne* v. *Inchiquin*, 1 Bro. C. C. 338; *Townsend* v. *Stangroom*, 6 Ves. 328; *Fowler* v. *Fowler*, 4 De G. & J. 250; *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 431), but not otherwise, unless the case is such that the Court can replace the parties in the same position as if the deed had not been executed: *Garrard* v. *Frankel*, 30 Beav. 445; *Harris* v. *Pepperel*, L. R. 5 Eq. 1; *Bloomer* v. *Spittle*, L. R. 13 Eq. 427. When it is proposed to set aside a deed as regards some of the parties only, it seems not to be essential that the mistake should be common to all: see *Bentley* v. *Mackay*, 4 D. F. J. 279. The rule appears to be that when there is a mutual mistake in a deed the remedy is to rectify by substituting the terms really agreed to; when the mistake is unilateral the remedy is not rectification but rescission, but the Court may give to a defendant the option of taking what the plaintiff meant to give in lieu of rescission: *Paget* v. *Marshall*, 28 Ch. D. 255. When there are no lands of the grantor exactly agreeing with the description in the deeds, it is permissible to use oral evidence to show what land was intended to pass: *Beaumont* v. *Field*, 1 B. & A. 247. Accordingly it is laid down in Shep. Touch. 248 that "if a man grant in this manner all or any meadow in D. containing 10 acres, and whereas in truth his meadow contains 20, it seems this is a good grant for the whole 20." Compare *Barton* v. *Dawes*, 10 C. B. 261 (stated *ante*, p. 168). In *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701, it was held that where premises were described as a messuage, "late in the occupation of A.," there the deed did not exclude oral evidence of the fact that a cellar under the messuage was not in the occupation of A., but of another tenant. Similarly, in *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442, where the parcels were described as "a messuage in the occupation of W., with the appurtenances," oral evidence was admitted to show that a garden adjoining had always been occupied with the messuage and passed by the deed. This evidence was admitted to show what was included in the strict words of the deed; and in the same case the Court refused to admit the evidence

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afforded by the conditions of sale and the purchaser's declarations which were offered to show that the garden was not included in his purchase, on the ground that such evidence "went to contradict the deed, not to apply the words of it to any particular thing:" see *Doe* d. *Preedy* v. *Holtum*, 1 Bro. & P. 53. The rule is also clearly laid down in a modern case, in which the question was whether the land on which an alleged trespass had taken place was or was not within the parcels in a deed, Lord *Cranworth*, C., said in his judgment: "In order to adapt the description contained in the lease or other instrument (whether expressed by words or by a diagram) to the line in nature meant to be designated by the description, it is necessary to have recourse to parol evidence. The description in the deed cannot be otherwise identified with the thing intended to be described. In this case, therefore, parol evidence was properly admitted for the purpose of showing whether the place in which the trespass complained of was committed was or was not included in the sett of the plaintiff:" *Lyle* v. *Richards*, L. R. 1 H. L. 222, at p. 229. So also where the question is to what property the description applies: *Fox* v. *Clarke*, L. R. 9 Q. B. 565.

It is clear that if an agreement refer to a plan as detailing the particular mode in which a building contract is to be executed, parol evidence is admissible to show the identity of the plan: *Hodges* v. *Horsfall*, 1 R. & My. 116; *Clinan* v. *Cooke*, 1 Sch. & L. 32; *Blagden* v. *Bradbear*, 12 Ves. 471. But the evidence must be such as to leave no doubt as to the paper to which reference is made: see *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1. In order to avoid questions the plan should be signed by the parties and annexed to, or (still better) endorsed upon, the instrument. This remark applies even more strongly in the case of a purchase-deed, as the plan will become part of the muniments of title, and must have a more enduring connection with the property than in the case of a building contract.

Inconvenience

The description will be sufficient if such as to

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arising from insufficient description.

enable the property in question to be identified (*z*). But there is no point in which titles are generally so defective as in evidence of identity. Conveyances are frequently settled by persons who are not acquainted with the locality and who are too apt to use the old descriptions, without noticing any changes which may have taken place in the boundaries of the lands or the division of fields. Changes in the configuration of land are constantly taking place, particularly where land is subdivided for building purposes. The result of a neglect to notice such changes is very often to render it impossible to discover any trace of identity from an inspection of the deeds; and in order to obtain evidence on the point it is necessary to have recourse to the extraneous aid of statutory declarations. Whenever any alterations have taken place in any part of an estate since the last conveyance they should be carefully noticed in the parcels; and if at any time the description contained in the muniments of title should have become obsolete the modern description of the parcels should be given; and it should be added that they were "formerly known and described as," &c., according to the old description, setting it out fully; it will not, however, be generally necessary to give any particulars of the instruments containing the former description.

Terms used in describing parcels.

It may be useful here to indicate the technical meaning of some terms of description of different

(*z*) In the case of copyhold lands, it has been decided that a general description is sufficient for entry on the Court rolls: *Long* v. *Collier*, 4 Russ. 267; but the considerations affecting descriptions on Court rolls differ materially from those respecting descriptions of parcels in ordinary deeds; for there is in these cases an additional element of certainty of identification arising from the traditional character of the descriptions which appear in the Court rolls.

While fines were employed in effecting the disentailing of lands, it was customary to make the parcels not so much a description of the actual property which was being dealt with as a series of descriptive words sufficiently wide to include at least the land in question. This practice has been retained in the modern disentailing deeds; in which there is seldom any attempt to describe the parcels accurately.

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Advowson. An advowson is the right of presentation or collation to a church, and may pass by the words "hereditaments situate, lying, and being in:" Dyer, 323, b. pl. 30; but the word "situate" is not appropriate to an advowson, and it will only pass under such general words upon evidence of that being the true intention: *Crompton* v. *Jarratt*, 30 Ch. D. 298.

In describing either advowsons or tithes no reference should be made to appurtenances.

Appurtenances. The word "appurtenances" will pass all that is usually enjoyed with the principal member of the parcels: *Hill* v. *Grange*, Plow. 170 a; *Doe* v. *Hottom*, 4 A. & E. 76; *Doe* v. *Webster*, 12 A. & E. 422; *Smith* v. *Martin*, 2 Wms. Saund. 806; and compare *Bryan* v. *Weathered*, Cro. Car. 17; *Maitland* v. *Mackinnon*, 1 H. & C. 607.

Farm. By the name of "a farm," houses, lands, and tenements may pass: Co. Litt. 5 a.

Garden. By a grant of a garden, the soil and any buildings thereon will pass: *Burton* v. *Brown*, Cro. Jac. 648. As to what is a garden, see *Gilbert* v. *Thomison*, 4 D. & R. 222.

Hereditaments. The term "hereditaments," like "tenements" (*infra*), is very comprehensive; it denotes every kind of property or right which will descend to the heir; it is therefore strictly applicable only to realty, but will include land and tenements and rights over such property of every description.

House. "House" will include the outbuildings and curtilage, and also a garden attached to the house: *St. Thomas's Hospital* v. *Charing Cross Rail. Co.*, 1 J. & H. 404.

Land. "Land" primarily means arable land, but "in legal signification it comprehendeth any ground, soil, or earth whatsoever;" also water covering its surface, mines and minerals thereunder, and houses and buildings standing upon it: see Co. Litt. 4 a; *Cooke* v. *Yates*, 4 Bing. 90; *Ewer* v. *Haydon*, Cro. Eliz. 476; *Luttrel's case*, 4 Rep. 87 b; *Canham* v. *Fisk*, 2 Cr. & J. 126.

Manor. "Manor" in a conveyance will pass the demesne lands of the manor, together with the seignory over

the customary freeholds and the freehold estate in the copyholds: see Co. Litt. 58 a; 2 Bl. Comm. 53. An advowson appendant to a manor will pass without being named as an appurtenance, by a grant of the manor: see *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477; except in the case of a grant by the Crown: see 17 Edw. 2, stat. 1, c. 15; Co. Litt. 121 b; *Att.-Gen.* v. *Sitwell*, 1 Y. & C. (Ex.) 559. The term "manor" will include a reputed manor: 4 Cru. Dig. 266; see sect. 2 of the Conveyancing and Law of Property Act, 1881. Parcels.

The term "messuage" is often used as synonymous with dwelling-house, but it seems properly to include also any land usually held therewith, and accordingly that term will pass a house and curtilage, garden, orchard, dovehouse, &c., and even a chapel or hospital may pass under this denomination: 2 West. Symb.; Shep. Touch. 12. Messuage.

A reversion strictly means the estate which will revert to the grantor or his assigns on the determination of a partial grant made by him out of his original estate, *e. g.*, the freehold reversion of the lord in the copyholds of a manor, or of a tenant in fee, who has granted a life estate or a lease, and the leasehold reversion of a lessee who has granted an underlease; but it is frequently used in a more extensive sense, denoting also an estate of the grantor in "remainder," expectant on the determination of a prior estate in possession. A reversion is best conveyed by granting the whole estate in the property in question, subject to the particular estates in existence, and not by describing the reversion by that title, as the reversion expectant on the particular estate under the settlement. By this means, mistakes in the description of the deeds and estates, which might vitiate the grant, are avoided. Formerly, in grants of freeholds, it was customary to insert a clause purporting to convey all reversion and remainders in the property. The clause appears to have been useless, and has now become obsolete. Reversion.

Stocks in the public funds should be described in the terms of the Act of Parliament by which they are created. Care should be taken to Stocks and shares.

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make it quite clear, whether the actual stock is being dealt with, or the proceeds thereof. Shares and stock in public companies should be described according to their proper designation in the books of the particular company.

Tenement.

The term "tenement" in general includes not only land, but every modification of right concerning it, corporeal or incorporeal: Co. Litt. 20 a; *Rex* v. *Inhabitants of Tolpuddle*, 4 T. R. 671.

Warren.

A grant of a "warren" is ambiguous: it may pass the soil: Co. Litt. 5 b; Shep. Touch. 90; but, in general, the use of the terms "warren" or "free warren," especially if words of limitation are added as "warren of conies," will merely import the grant of a liberty or franchise without the soil: *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223; *Robinson* v. *Duleep Singh*, 11 Ch. D. 798.

Water.

A grant of "water" will pass merely a right of fishing, and not the soil which is covered by the water: 2 Bl. Com. 18; the proper description is, "that piece of land covered by water," describing it; it is said, however, that by a grant of a "pool," the water and land will pass: see Co. Litt. 4 b, 5 b.

Wood.

The soil will pass by a grant of a "wood," but not by a grant of "trees": Shep. Touchst. 10, 94; *Stanley* v. *White*, 14 East, 332.

Leasehold parcels usually described in recitals.

In assignments of leaseholds, the property to be assigned is usually described fully in the recital of the lease creating the term, and according to the description in the lease, and the parcels will be shortly described as "the messuage and premises comprised in and demised by the said lease," or as the case may require. If the property has undergone any material alteration since the lease, the fact should appear in the description of the parcels in the assignment.

Ejusdem generis.

Sometimes, a clause in general terms is added at the close of the parcels, intended to embrace all parts of the property, which may possibly have been omitted from the body of the description. Thus, in *Lord North* v. *Bishop of Ely* (cited 1 Bulst. 100), the bishop demised a manor-house and certain closes and demesnes by name, "and all other his

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lands and demesnes." Only those matters which are *ejusdem generis* with the property specifically described will pass by phrases of this kind. Thus, in *Lord North* v. *Bishop of Ely*, it was held that ancient park and copyhold land did not pass. See also *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Moore* v. *Magrath*, 1 Cowp. 12; *Doe* d. *Meyrick* v. *Meyrick*, 2 Cr. & J. 223; *Doungsworth* v. *Blair*, 1 Keen, 795; *Pope* v. *Whitcomb*, 3 Russ. 124; *Doe* d. *Pell* v. *Jeyes*, 1 B. & Ad. 593; *Lyndon* v. *Stanbridge*, 2 H. & N. 51; *Harrison* v. *Blackburn*, 17 C. B. N. S. 678; *Re Wright*, 15 Beav. 367; *Clifford* v. *Arundel*, 1 De G. F. & J. 311.

Place and nature of exceptions and reservations.

Exceptions and Reservations.]—Any exceptions or reservations intended to be made out of the conveyance will be most conveniently mentioned immediately after the description of the parcels. An exception is of a part of the thing granted, a reservation is of some right or profit to arise out of it: see *ante*, Vol. III., p. 132. Therefore, where, on a grant, the grantee desires to retain mines or trees, or any portion of the property, he should except it from the conveyance; but if he wishes to secure to himself some right or easement, or profit over or in relation to the property, it should be reserved.

The effect of exceptions relating to timber and trees, and to mines and minerals, is discussed *ante*, Vol. III., tit. Leases, pp. 136—138. Timber and trees are not often excepted on a sale of land. It may be well, however, to add in this place a few further remarks with regard to exceptions of mines and minerals in conveyances by way of sale. An exception of mines and minerals will carry with it a reservation of all powers and liberties necessary for working the minerals, just as a grant of mines and minerals will: *Aspden* v. *Seddon*, L. R. 10 Ch. 394; *Proud* v. *Bates*, 34 L. T. N. S. 406; *Duke of Hamilton* v. *Graham*, L. R. 2 Sc. & D. 166; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Pomfret* v. *Ricroft*, 1 Wms. Saund. 557; and *ante*, Vol. III., tit. Leases, p. 496, n.; as to the effect of a grant of

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specific rights, see *post*, p. 193. But though the right incident to the grant or exception is available to the owner of the minerals for any purpose for which he thinks fit to employ it: *Proud* v. *Bates*, 34 L. T. N. S. 406; *Duke of Hamilton* v. *Graham*, L. R. 2 Sc. & D. 166; it may not be exercised so as to damage the surface, even though this restriction destroy the value of the right; for the presumption is, that the owner of the surface is entitled to the full enjoyment of the surface in the condition in which it was when the right was acquired by the owner of the minerals; but where the parties have contemplated and contracted that the grantor may take the minerals, making compensation for injury done to the surface, he will not be restrained by injunction: *Harris* v. *Ryding*, 5 M. & W. 60; *Rogers* v. *Taylor*, 2 H. & N. 528; *Rowbottom* v. *Wilson*, 8 H. L. C. 348; *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377; *Smith* v. *Darby*, L. R. 7 Q. B. 716; *Hext* v. *Gill*, L. R. 7 Ch. 699; *Aspden* v. *Seddon*, L. R. 10 Ch. 394; *Davis* v. *Treherne*, 6 App. Ca. 460; *Mundy* v. *Duke of Rutland*, 23 Ch. D. 81; *Love* v. *Bell*, 9 App. Ca. 286. This limitation does not attach where the minerals are vested in the grantor by virtue of the statutory effect of a grant of land to a railway company; in these cases, the grantor is bound to give notice to the railway company of his intention to work the minerals (8 & 9 Vict. c. 20, s. 78), and if the company does not purchase them, he is entitled to work the mines without any regard to the effect of the working upon the surface (*a*): *Fletcher* v.

(*a*) Similarly, where a sewer was constructed under statutory powers, it was held that there was no right to lateral support incident to the statutory powers, but that the necessary easement must be purchased: *Metropolitan Board of Works* v. *Metropolitan Rail. Co.*, L. R. 3 C. P. 612; L. R. 4 C. P. 192; but, as to a sewer constructed under the Public Health Act, 1875 (38 & 39 Vict. c. 55), see *Re Corporation of Dudley*, 8 Q. B. D. 86. So, where a gas company laid down mains in a highway without the authority of the landowner and without statutory powers, but with the permission of the highway authorities, and the company subsequently became incorporated and obtained statutory powers to maintain gas-works and property, and the lessee of the mines from the

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Great Western Railway, 4 H. & N. 242; 5 H. & N. 616; *Great Western Rail. Co.* v. *Bennett*, L. R. 2 H. L. 27. The right of the purchaser to support may, of course, be limited by provisions for that purpose in the deed; but clauses of this nature will be interpreted according to the position of the parties at the time of the grant: *Mordue* v. *Dean and Chapter of Durham*, L. R. 8 C. P. 336.

Where a part of the property is excepted out of a grant, the exception carries with it all rights and members, in the same way as a direct grant by the grantee to the grantor would have done: *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 172.

Where there is an exception which may refer to more than one part of the subject-matter of the grant, the grantor has a right to elect which he will take under it: *Thomas Lee's Case*, 1 Leon. 268; and compare the somewhat similar case of *Bolton* v. *Bolton*, 11 Ch. D. 968.

An exception may be of use in assisting in the construction of the parcels; as it may indicate what was intended to pass, by showing what was not intended to pass: *Ivison* v. *Gassiot*, 3 D. M. G. 958; cf. *Williams* v. *Mercier*, 10 App. Cas. 1.

In Shep. Touchst. 78, the following requisites of a good exception are stated:—1. The exception must be by apt words. 2. It must be of part of the thing granted and not of some other thing. 3. It must be of part of the thing only, and not of all, or of the effect of the thing granted, for if the exception extends to the whole thing granted, it is void: *Dorrell* v. *Collins*, Cro. Eliz. 6; so, on a grant of lands, an exception of the profits would be bad. 4. It must be of such a thing as is severable from the thing granted. 5. It must be such a thing as he that doth except may have, and doth properly belong to him. 6. It must

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landowner damaged the mains by his workings, it was held that the gas company was entitled to damages from the lessee of the mines; that the landowner was entitled to compensation for the additional burden imposed upon his land, and also that the lessee of the mines was entitled to compensation for the limitation put upon the uses of the coal: *Normanton Gas Co.* v. *Pope and Pearson*, 49 L. T. 798.

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be of a particular thing out of a general, and not of a particular thing out of a particular thing, or of a part of a certainty (*b*). An exception out of an exception is good, and leaves the thing to pass by the grant as if it had never been excepted: *Leigh* v. *Shaw*, Cro. Eliz. 372; see Shep. Touchst. 78.

An exception is always construed most strongly against the grantor, on the ground that the words are his words: *Bullen* v. *Denning*, 5 B. & C. 850.

Reservations.

The term reservation is properly applied to clauses whereby the grantor secures to himself something issuing out of the thing granted, such as rights of working mines, of way, of water, of light, or of any other nature (*c*), or any profit such as a rent-charge or other periodical payment. A reservation, like an exception, must be consistent with the grant and the rest of the deed, or it may be rejected as being repugnant: Shep. Touchst. 88.

It is not uncommon for grantors on excepting mines, to reserve to themselves powers of working. As a rule, such powers, expressly reserved, are not construed so as to abridge the powers which the law confers as incident to the exception: *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Hodgson* v. *Field*, 7 East, 613. Accordingly, where it is proposed that certain powers only shall be exercised by the grantor, care should be taken expressly to exclude the exercise by him of any others: see *Bell* v. *Wilson*, 11 Jur. N. S. 437; *Midland Rail. Co.* v. *Checkley*, L. R. 4 Eq. 19. The powers which the law gives extend only to those acts which are necessary for the proper enjoyment of what is excepted from the grant. In the case of timber it

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(*b*) By the sixth requisite appears to be meant that a general grant of all A.'s houses at B., except a particular house, would be good, but not a grant of three particularly specified houses, except one of them.

(*c*) Sporting rights, strictly speaking, are not either exceptions or reservations; they ought to be expressly re-granted; but a reservation of such rights may be held to enure as a re-grant: *Wickham* v. *Hawker*, 7 M. & W. 63; see *Durham and Sunderland Rail. Co.* v. *Walker*, 2 Q. B. 967; *Ewart* v. *Graham*, 7 H. L. C. 331; see also *ante*, tit. Leases, Vol. III., p. 133.

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appears that these powers will extend to the bringing chapmen to view the trees which are still standing: Shep. Touchst. 100; but see *Foster* v. *Spooner*, Cro. Eliz. 18; *Sir John Talbot* v. *Woodhouse*, 2 Lutw. 1480; *Liford's Case*, 11 Rep. 48 a; *Ashmead* v. *Ranger*, 1 Ld. Raym. 552; whereby the right appears to have extended no further than the entering and cutting. But it seems that in the case of mines, the owner of the mines cannot reckon upon those implied powers as giving him a right to make a deposit of iron-coal, or to take intending purchasers on to the land: *Earl of Cardigan* v. *Armitage*, 2 B. & C. 211. Express powers should, therefore, be reserved when it is desired to extend the rights of the owner beyond what is absolutely necessary for the purpose of enabling him to obtain the enjoyment of that which has been retained by him.

Implied grant and reservation of necessary easements.

Where a grantor has conveyed property to a purchaser or grantee, the law assumes, in the absence of any statement to the contrary, that he has granted it, with all the rights and easements belonging to it. The law also holds that a grantor cannot derogate from his own grant: *Wheeldon* v. *Burrows*, 12 Ch. D. 31; and that a grant must be construed most strongly against the grantor: Shep. Touchst. 87; Cru. Dig. tit. 32, ch. 20, s. 13; *Re Stroud*, 8 C. B. 529; *Fowkes* v. *Manchester and London Assurance Association*, 3 B. & S. 925; *Neill* v. *Devonshire*, 8 App. Cas. 149. But this rule of law is subject to an exception, and that is that where a right in the land granted is absolutely necessary for the beneficial enjoyment of the property retained, the grantor must be taken to have reserved it to himself. "If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto, but through one of those which he sold, although he reserved not any, yet he shall have it as reserved unto him by law:" *Clark* v. *Cogge*, Cro. Jac. 170. To the same effect in the cases of *Jorden* v. *Attwood*, Owen, 122; *Staple* v. *Heydon*, 6 Mod. 1; *Howton* v. *Fearson*, Willes, 72; *Chester* v. *Lethbridge*, Willes, 72 n.; *Dutton* v. *Taylor*, 2 Lutw. 1487. In

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the last case the maxim for this rule is said to be that it is a matter of public policy, as the land-locked close could not otherwise be cultivated. On these cases were decided *Pinnington* v. *Galland*, 9 Exch. 1; *Dodd* v. *Burchell*, 1 H. & C. 113; and reference may be made to *Pearson* v. *Spencer*, 3 B. & S. 761; *Worthington* v. *Grierson*, 2 E. & E. 618; *Barlow* v. *Rhodes*, 1 Cr. & M. 449; *Richards* v. *Rose*, 9 Exch. 218; *Osborne* v. *Wise*, 7 C. & P. 761; *Pheysey* v. *Vicary*, 16 M. & W. 481; *Davies* v. *Sear*, L. R. 7 Eq. 427; *Bolton* v. *Bolton*, 11 Ch. D. 968; *Corporation of London* v. *Riggs*, 13 Ch. D. 798.

What are easements of necessity.

A way of necessity is limited to the purposes for which it was necessary at the date of the grant under which it arises, and may not be used for any other purposes: *Corporation of London* v. *Riggs*, 13 Ch. D. 798; and it is limited as to its duration by the continuance of the necessity for it: *Holmes* v. *Goring*, 2 Bing. 76; but where land was purchased by a local authority, and the only way to which was over other land, it was held that they were entitled to use the road for all purposes for which they bought the land: *Serff* v. *Acton Local Board*, 31 Ch. D. 679.

The rights thus vested in the grantor are usually spoken of as arising from a re-grant to him by the grantee: *Corporation of London* v. *Riggs*, 13 Ch. D. 798. As to the difficulty that may arise, if this be the strict view, with regard to an easement of necessity reserved by implication on a grant which is not executed by the grantee: see 1 Wms. Saunders, p. 573, notes to *Pomfret* v. *Ricroft*.

The right to indicate the direction which a way of necessity shall take over the servient tenement, belongs to the owner of that tenement: *Bolton* v. *Bolton*, 11 Ch. D. 968.

Easements may apparently be implied in cases where they are of a mutual character. For example, the right to lateral support may be implied in a grant of a house by the owner of two adjoining houses which mutually support each other: *Richards* v. *Rose*, 9 Exch. 218; *Gayford* v. *Nicholls*, 9 Exch. 702; but it may be doubted whether there is not

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rather a case of an easement arising by necessity: *Shurbrook* v. *Tufnell* (No. 1), 46 L. T. 886; and compare *Russell* v. *Watts*, 25 Ch. D. 572, 10 App. Cas. 590; where, though the case was argued as one of mutual light, the decision seems to have rested on the ground of the existence of a collateral agreement intended to secure the enjoyment of the easement in question: see *per* Earl of *Selborne*, L. C. at p. 602; and in the words of *Selborne*, L. C., for either party to insist on the benefit of such an agreement, so far as it is in his favour, is not to derogate from his own grant, but to require that the other party shall not do so.

The principle thus established as to easements of necessity was extended in the case of *Pyer* v. *Carter*, 1 H. & N. 916, to a drain, as being an apparent and continuous easement. The case was referred to, in *obiter dicta*, by two judges in the Court of Appeal, in the case of *Watts* v. *Kelson*, L. R. 6 Ch. 166; but this appears to be the only case in which it has been approved. The rule of law (*d*) has been repeatedly laid down to be, that an absolute conveyance gives, as against a grantee, any right which a grantee would have to use the thing granted in a lawful way, and that if a grantor wishes to reserve any right or easement over the thing granted, he must do so in express terms; and that, even though the easement in question be continuous and apparent, the grantor must be taken to intend to relinquish the easement, unless he says that he does not: *White* v. *Bass*, 7 H. & N. 722; *Suffield* v. *Brown*, 4 De G. J. & S. 185; *Crossley* v. *Lightowler*, L. R.

(*d*) The distinction between the case of a vendor and a purchaser in respect of implied easements is well exemplified in the old case of *Tenant* v. *Goodwin*, 2 Ld. Raym. 1093. In that case Lord *Holt*, referring to *Palmer* v. *Fletcher*, 1 Lev. 122, said "If, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and, as he cannot do it, so neither can his vendee. But, if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house. But, in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights."

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2 Ch. 478; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Russell* v. *Watts*, 10 App. Ca. 590.

Reservations on contemporaneous sales.

When land is sold in lots, questions may arise as to the rights, in respect of apparent and continuous easements, of the parties claiming under the same vendor by grants which are practically simultaneous. Where the sales are not actually, or in effect, simultaneous, the case is clear that the purchaser who is second in point of time can have no rights against the first purchaser other than those of the vendor, and that he has to bear all his liabilities: *Swanborough* v. *Coventry*, 9 Bing. 305; *Murchie* v. *Black*, 11 Jur. N. S. 608; *Wheeldon* v. *Burrows*, 12 Ch. D. 31. But where the sales and conveyances are practically simultaneous, it would appear that the rights of the respective purchasers will be the same as if they had each been first in order of time: *Cox* v. *Matthews*, 1 Ventr. 237; *Rosewell* v. *Pryus*, 6 Mod. 116; *Compton* v. *Richards*, 1 Pir. 27; *Allen* v. *Taylor*, 16 Ch. D. 355; *Rigby* v. *Bennett*, 21 Ch. D. at p. 567. It is, however, to be noted that this is not really a reservation: "but in order to make all those grants which are looked upon as one transaction available and effectual, it is considered that each of the grantees is to be looked upon as taking from the grantor while he has the power to give it, what it is right that he should get; so that there is an implied grant against all the other grantees of those easements which will be reasonably necessary for the property which is conveyed," *per Cotton*, L. J., *Russell* v. *Watts*, 25 Ch. D., at p. 573; and this case, of several contemporaneous grants, is referred to as an example of the strong way in which the courts insist upon the principle that a grantor shall not derogate from his own grant. The result is that all *quasi* easements which existed between the lots in the hands of the vendor are perpetuated by way of implied grant, in the hands of the respective purchasers.

It may be stated as a result of the authorities, that a vendor will do wisely in reserving in express terms any easement, affecting the part of his property which he is selling, whether necessary or not,

which he desires to retain, so as to avoid questions as to what he is entitled to as against his grantee. Parcels.

General Words.]—After the description of the parcels it was the invariable practice to add a clause, by which the grantor purported to include in his grant all those parts, or subsidiary members, of the property which were not usually described with minute accuracy in the parcels, and also all easements, rights, and liberties which belonged to him at the date of the grant, as appurtenant to the property granted. This clause, commonly called "general words," comprised a number of words which were inserted, with perhaps too little regard to the actual requirements of each case. A grant of land, pure and simple, will pass all that the law considers as being part and parcel thereof, and all that is legally appurtenant thereto, and also all such rights and easements as are necessary to the proper enjoyment thereof in the state in which the property was at the time at which it was granted. Many of the words commonly inserted in this clause would have no effect, as they could purport only to convey such portions of the property or such rights and easements as would pass under a mere grant of the land. "General words, as we all know, are almost always, if not always, unmeaning; and you can in fact only lay hold of them to sometimes extend the operation of an instrument; as for example, to easements which have become extinguished by unity of seisin or enjoyment, or in some other way. They have no operation, and the only wonder is that they have been allowed to remain so long in the conveyancer's pigeon-holes to be put in every deed, when in truth they have really no meaning or effect at all." *Per Hall*, V.-C., in *Wood* v. *Saunders*, 44 L. J. Ch. 510. General words.

But general words have in many cases been held to pass what without them might not pass by the deed, that is, the clause has been held to operate to grant more than the law would otherwise give: see *Bailey* v. *Great Western Rail. Co.*, 26 Ch. D. at p. 444. In *Willis* v. *Watney*, 51 L. J. Ch. 181, a yard which was not marked in the plan referred to What passes by general words.

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by the parcels, was held to pass under the word "yards" in the general words in the deed. Nothing, however, will pass by the general words which would not pass by the grant unless it is intended in the strict meaning of the terms used: *Barlow* v. *Rhodes*, 1 Cr. & M. 439; *Morris* v. *Edgington*, 3 Taunt. 24; *Kooystra* v. *Lucas*, 5 B. & Ad. 830.

General words will pass only that which the grantee had to give at the date of the grant, and will not extend to anything he may subsequently acquire: *Booth* v. *Alcock*, L. R. 8 Ch. 663. In other words, this clause will work no estoppel, for it contains no representation by the grantor that he has anything to grant, only that if he has anything to grant, he grants it.

Effect of general words in creation or revivor of easements.

Questions as to the interpretation of general words have usually arisen upon a severance of tenements by the grant of one of them in respect of easements, or *quasi* easements which have been extinguished by unity of possession, and have been enjoyed by the grantor himself during unity of possession. Those easements or *quasi* easements which are legally appurtenant to a tenement, and prejudicially affect the property of a stranger, and those which are of necessity, appear to pass by the operation of the grant itself: see *infra*, p. 193. But where the owner of a dominant tenement acquires the servient tenement (whereby the easement becomes extinct), or where the owner of two tenements creates an easement over one for the benefit of the other, and subsequently aliens the dominant tenement, the easement may be revived or created by virtue of the general words.

It must be borne in mind that continuous easements, such as the right to light, will pass independently of general words by the effect of the grant at law. But the case is otherwise when the right is not continuous. It was said by *Erle*, C. J., in *Polden* v. *Bastard*, L. R. 1 Q. B. 161, that "there is a distinction between easements used from time to time, as a right of way, and of necessity or continuous easements. The cases recognise this distinction, and it is clear law that upon a severance

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of tenements, easements used of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language shows an intention that they should pass." See also *Watts* v. *Kelson*, L. R. 6 Ch. at p. 173; and *Kay* v. *Oxley*, L. R. 10 Q. B. at p. 366.

Revivor of extinguished easements.

When an easement which had a prior existence has become extinct by unity of possession, it will be revived if the language of the deed is sufficient to indicate an intention that it shall be revived. When an easement has become extinct by unity of ownership, and the owner wishes to grant the easement with the premises to which it was formerly appurtenant, he must use language to show that he intended to create the easement *de novo*: *Barlow* v. *Rhodes*, 1 Cr. & M. 448; and it appears from the remarks of *Bayley*, B., in that case, that general words will be sufficient for that purpose if they describe the easements as "used and enjoyed" with the parcels; but will not be enough if they be spoken of as "appertaining and belonging" to the premises; as these terms will pass no more than the law would give independently of the general words: see also *Whalley* v. *Thompson*, 1 Bos. & P. 171; *Brett* v. *Clowser*, 5 C. P. D. 376; *Hinchcliffe* v. *Earl Kinnoul*, 5 B. N. C. 1; *James* v. *Plant*, 5 B. & Ad. 791, 4 A. & E. 749; *Worthington* v. *Gimson*, 2 E. & E. 618. It was, however, suggested by *Fry*, L. J., in *Bailey* v. *Great Western Rail. Co.*, 26 Ch. D. 34, at p. 457, that a right of way over a formed road would probably pass by a mere grant, without general words; but this question is now of little practical importance, having regard to the operation of the Conveyancing and Law of Property Act, 1881, referred to *infra*, p. 189.

In cases where the owner of two tenements has, in the exercise of his right of ownership, created over one of them a *quasi* easement which was not in existence prior to the unity of possession, it may now be regarded as settled that the easement will pass by virtue of the general words (*i.e.*, "used and

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enjoyed," or the like) if the easement be apparent. The authorities would be quite clear and consistent on this point, but for the cases of *Thompson* v. *Waterlow*, L. R. 6 Eq. 36, and *Langley* v. *Hammond*, L. R. 3 Ex. 161. In the former case the ground of decision may not be obvious; but in the latter case *Kelly*, C. B., and *Martin*, B., expressly stated their opinion that general words will not avail to revive a right which did not exist at any time prior to the union of the ownership in the two closes in the same person. This case, and, so far as it is based on the same reasoning, the case of *Thompson* v. *Waterlow*, L. R. 6 Eq. 36, also must now be considered as overruled: see *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616; *Bailey* v. *Great Western Rail. Co.*, 26 Ch. D. 434. In *Barkshire* v. *Grubb*, 18 Ch. D. at p. 622, *Fry*, J., thus states the law on the subject: "When there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words, 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantor, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

So, where the owner of the two closes has made and used a watercourse or a road over the one for the benefit of the other, and then sells the latter, it appears now to be settled law that the easement will pass by the general words. This rule was upheld in several old cases: *Wordledg* v. *Kingswel*, Cro. Eliz. 794; *Kooystra* v. *Lucas*, 5 B. & A. 830; *Staple* v. *Heydon*, 6 Mod. 1. Where, however, the owner of two closes passes over the one to get to the other, such passage may be referred to his ownership merely, and may amount to no more than an exercise of his rights of ownership for his own convenience: see *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Bolton* v. *Bolton*, 11 Ch. D. 970. Probably when there is no more than this, no right of way would pass, without a clear and express grant of the

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easement. This may perhaps have been the *ratio decidendi* of the case of *Thompson* v. *Waterlow*, L. R. 6 Eq. 36; for it appears, upon a comparison with the report of the same case in 27 L. J. Ch. 498, that the road in that case was a mere desultory cart track, and not a formed road: see remarks of *Lush*, J., in *Kay* v. *Oxley*, L. R. 10 Q. B. at p. 370.

A right of common which has become extinguished by the union in the same person of the ownership of the servient and dominant tenement, will be revived by a grant of the dominant tenement with appropriate general words: compare *Marsham* v. *Hunter*, Cro. Jac. 253; *Clements* v. *Lambert*, 1 Taun. 205; *Hall* v. *Byron*, 4 Ch. D. 667 (where the words were not adequate) with *Wordledg* v. *Kingswel*, Cro. Eliz. 794. It may be observed that the general words implied by statute (as to which see *infra*) are sufficient to pass such a right of common.

Where lands were allotted to the owner of a farm in respect of certain common rights enjoyed in virtue of his ownership of the farm, it was held that a grant of the farm with the usual general words did not pass the allotted lands: *Williams* v. *Phillips*, 8 Q. B. D. 437.

General words now usually omitted.

The remarks which have been made upon general words are based upon cases arising in connection with deeds in which, in accordance with former practice, the general words were inserted at length. This practice is now generally rendered unnecessary by the 6th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), by which it is enacted as follows:—

General words in conveyances of land, buildings, or manor.

Sect. 6. "(1.) A conveyance of land shall be deemed to include, and shall by virtue of this Act operate to convey with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

"(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include, and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all

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outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

"(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

"(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

"(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

"(6.) This section applies only to conveyances made after the commencement of this Act."

It will be noticed that the clause which is thus by the statute inserted in conveyances, is in terms sufficient to carry with it any rights or easements which would pass under the ordinary general words formerly in use, the words being explicit enough to revive an extinguished right: see *Barlow* v. *Rhodes*,

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1 Cr. & M. 448; and *ante*, p. 187. Thus a vendor who desires not to grant any right or easement, whether extinguished or newly created by him, must be careful to exclude it in terms, so as to prevent a possibility of its passing under the statutory general words; and on the other hand, when it is part of the bargain that any such right or easement should pass to the purchaser, the latter will do well to see that it is definitely granted in express terms.

What will pass by simple grant.

It may be useful in this place to note what will impliedly pass by a simple grant of land.

Mines, &c.

Primâ facie, a grant of land carries with it all that is upon the land, and all that is below it; for *cujus est solum ejus est usque ad cœlum et ad inferos:* so houses, trees, and the like will pass, and also mines, minerals, quarries, and so forth: Shep. Touchst. 90; *Townley* v. *Gibson*, 2 T. R. 701; *Corbett* v. *Hill*, L. R. 9 Eq. 671; *Re Metropolitan District Railway & Cosh*, 13 Ch. D. 607; and an unknown, though defined subterranean stream of water passes: *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R. Ir. 172. But if the grantor have parted with his interest in any part of this, *e.g.*, the mines, they will not pass. Nor will mines and minerals pass in a conveyance to a railway or a waterworks company, unless specifically mentioned: see 8 & 9 Vict. c. 20, s. 77; and 10 Vict. c. 17, s. 18 (*e*). The statement applies in strictness only to freehold land; for in the case of copyhold land, those parts of mines, &c., which are in the land will, of course, not pass by a transfer of the copyhold interest.

Soil of highway.

When lands which are bounded by a highway are the subject of a conveyance, the soil of the highway *ad medium filum viæ* will *primâ facie* pass. The presumption of law is that the soil of the road up to the middle line belongs to the owner of the adjoining land: *Steel* v. *Prickett*, 2 Stark. 468; *Grove*

(*e*) The owner of mines thus excepted from a grant to a railway company may not enter upon or cross over the railway in order to get to his mines, but must tunnel under it: *Midland Rail. Co.* v. *Miles*, 30 Ch. D. 634.

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v. *West*, 7 Taunt. 41. When there is a strip of land between the enclosure and the highway, this, following the same reasoning (*f*) as that on which the presumption of law as to the soil of the highway is based, will belong to the owner of the adjoining property: *The Marquis of Salisbury* v. *The Great Northern Rail. Co.*, 5 C. B. N. S. 174; *Berridge* v. *Ward*, 10 C. B. N. S. 415; *Simpson* v. *Dardy*, 8 C. B. N. S. 433; *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; *Scoones* v. *Morrell*, 1 Beav. 251; *Holmes* v. *Billingham*, 7 C. B. N. S. 329; *Smith* v. *Harden*, 14 C. B. N. S. 398. The soil will pass by the deed, even though the land be set out by boundaries on a plan and described by admeasurement, in such a way as to exclude it: *Berridge* v. *Ward*, 10 C. B. N. S. 400; 7 Jur. N. S. 876. The rule, however, would probably not be held to apply to a case of a conveyance of a plot of land part of a building estate: *Plumstead Board of Works* v. *British Land Co.*, L. R. 10 Q. B. 16; *Leigh* v. *Jack*, 5 Ex. D. 264; or to a street in a town: *Beckett* v. *Corporation of Leeds*, L. R. 7 Ch. 421.

Beds of rivers.

A similar presumption of law prevails with regard to the ownership of the bed of a non-tidal river. The beds of all navigable rivers and arms of the sea belong, *primâ facie*, to the Crown; in such cases the property of the adjoining owner is bounded, in the absence of evidence to the contrary, by high-water mark: Hale de Jure Maris, ch. 4, p. 13; *Gunn* v. *Free Fishers of Whitstable*, 11

(*f*) It is said that in former times landowners, in order to prevent their crops from being damaged by the public in the exercise of the right, where ways happened to be foundrous, to go over the adjoining land (Com. Dig. tit. *Chemin*, D. 6; *Dawes* v. *Hawkins*, 8 C. B. (N. S.) 848), set back the fences of their enclosures, leaving the strips of waste for the convenience of the public. But where a strip communicates immediately with a common, the presumption that the strip was thus separated from the rest of the land is rebutted; and it will be held to belong to the lord of the manor as part of the waste of the manor: *Grose* v. *West*, 7 Taun. 39; *Doe* d. *Barrett* v. *Kemp*, 2 B. & L. 102; *Headlam* v. *Hedley*, Holt, N. P. 465. Nor does the presumption arise where the dedication of land for a highway has not actually taken place: *Leigh* v. *Jack*, 5 Ex. D. 264.

H. L. C. 192; *Lord* v. *City of Sydney*, 12 Beav. P. C. 473; *R.* v. *Landulph*, 1 M. & Rob. 393; *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47; *Eccleston* v. *Crossley*, 18 L. T. N. S. 15; and the same rule applies to the seashore also: *Att.-Gen.* v. *Chambers*, 4 D. M. G. 206; *Reg.* v. *Gee*, 1 E. & E. 1068. The rights of the Crown and of the adjoining landowner alter with the encroachment or retirement of the sea: *Re Hull & Selby Railway*, 5 M. & W. 327; *R.* v. *Lord Yarborough*, 3 B. & C. 91. But when a river is not navigable, the riparian owner is, *primâ facie*, owner of the bed *usque ad medium filum*: *Reg.* v. *Pratt*, 3 C. L. R. 686; *Wishart* v. *Wyllie*, 1 Macq. 389; *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 864; *Micklethwait* v. *Newby Bridge Co.*, 33 Ch. D. 133. The property in the portion of the bed of a stream belonging to a riparian owner would pass by a grant of the land abutting upon the stream, without any specific mention. But the rights of a riparian owner by no means extend to the same lengths as his rights over his land: see *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47; and *Att.-Gen.* v. *Earl of Lonsdale*, L. R. 7 Eq. 377. Parcels.

The property in banks follows that of the soil upon which they stand; and as, in digging a ditch, a man may not trespass upon his neighbour's land by digging there, he usually digs to the extreme verge of his own land, and then must throw the excavated soil on to his own land, it follows that where there is a ditch and a hedge or bank, the hedge or bank and the ditch will belong to the owner of the land on the side of the hedge remote from the ditch. No such presumption, however, seems to arise with regard to a hedge or bank which has a ditch on each side of it: *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 308; *Guy* v. *West*, 2 Selw. N. P. 1244; *Vowler* v. *Miller*, 3 Taun. 138. Fences.

Even without the words "with their appurtenances," all rights and easements which are legally appurtenant to the land will pass; and so will commons appendant or appurtenant: Burton, Comp. 353; Shep. Touch. 89; *Whistler's Case*, 10 Rep. 63 a. Rights and easements.

As regards easements, a grant of land "with its

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appurtenances" will, as a matter of law, carry with it a grant of all easements over the land of a third party: *Beaudley* v. *Brook*, Cro. Jac. 189; *Morris* v. *Edgington*, 3 Taunt. 24; *Whalley* v. *Thompson*, 1 Bos. & P. 371; *Skull* v. *Glenister*, 7 L. T. 827. But it will also operate to pass certain easements over other land of the vendor retained by him. The question has already been touched upon as to what easements or quasi-easements will pass by general words, and it has been noticed that, in order to pass non-continuous easements and easements which are not necessary, there must be a clear grant thereof. But the words commonly included in the "all the estate" clause (see *infra*), and now incorporated in all deeds by the 63rd section of the Conveyancing and Law of Property Act, 1881, seem to be sufficient for the purpose of such grant, and there is apparently no need of special words of grant to pass easements which have either been extinguished by unity of possession or have been first created by the grantor during unity of ownership, provided that they are either necessary or apparent and continuous. The reason for this appears to be that to hold otherwise would be to allow a grantor to derogate from his own grant: *Palmer* v. *Fletcher*, 1 Lev. 122. It is said in some cases that the right of the purchaser is to have such easements and rights as are necessary for the enjoyment of the property in the state in which it was enjoyed by the grantor at the time immediately preceding the grant: *Pyer* v. *Carter*, 1 H. & N. 921; *Ewart* v. *Cochrane*, 4 Macq. 117. Thus in *Rosewell* v. *Pryor*, 6 Mad. 116, *Holt*, C.J., lays down the rule as applied to lights; it was applied to a case of drains in *Ewart* v. *Cochrane*, 4 Macq. 117; *Pyer* v. *Carter*, 1 H. & N. 916; to a right to water in *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Wardle* v. *Brocklehurst*, 1 E. & E. 1058; and to the right to support: *Palmer* v. *Fletcher*, 1 Sid. 167; *Richards* v. *Rose*, 9 Exch. 218. From a consideration of the cases it appears that an easement would be apparent only in the sense of being discoverable by a proper and careful examination of the

tenement: *Pyer* v. *Carter*, 1 H. & N. 916; *Watson* v. *Troughton*, 48 L. T. 508; *Glave* v. *Harding*, 27 L. J. Ex. 286; *Spanton* v. *Hinves*, 3 F. & F. 52; *Hinchcliffe* v. *Earl Kinnoul*, 5 B. & C. 1; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Elliott* v. *North-Eastern Rail. Co.*, 10 H. L. C. 356; *Polden* v. *Bastard*, L. R. 1 Q. B. 156. That such easements will pass without any special words, by virtue of the grant itself, appears from *Clarke* v. *Rugge*, 2 Roll. Abr. 60, p. 17; *Parker* v. *Welsted*, 2 Sid. 111; *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Pennington* v. *Galland*, 9 Exch. 1; *Barlow* v. *Rhodes*, 1 Cr. & M. 439; *Polden* v. *Bastard*, L. R. 1 Q. B. 156. Parcels.

A grant of freehold property will also pass the fixtures which are attached thereto. When it is intended that the purchaser shall pay for fixtures, this should always be expressed; for it should seem that whatever would descend to the heir as being fixed to the freehold (*g*), though, as between landlord and tenant, belonging to and removeable by the latter, would pass to a purchaser with the house or land. The general rule, regulating what are fixtures, is that which obtains between the real and personal representatives, and not that which prevails between landlord and tenant, which is an exception to the general rule, founded on convenience of trade: *Colegrave* v. *Dios Santos*, 2 B. & C. 76. The question in regard to fixtures seldom arises when the parcels consist of a tenanted house; for in such a case all that do not belong to the tenant, and those only, would pass with the house, for as notice of a tenancy is notice of its tenure (see *Daniels* v. *Davison*, 16 Ves. 249), the purchaser would probably be considered to have inquired and to be aware of the rights of the tenant in this respect. This remark of course only applies where the purchaser has notice Fixtures.

(*g*) The actual fixing of a thing, which otherwise would be a chattel, is not always essential to make it technically a fixture: *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382; *Ex parte Astbury*, L. R. 4 Ch. 630. In order to constitute a fixture a thing must either be actually affixed, or be an essential part of what is actually affixed to the soil.

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of an existing tenancy, and not to a case where property is described with reference to a late tenancy: *Miles* v. *Langley*, 1 Russ. & M. 39.

If it is for any reason deemed necessary to refer to fixtures specifically, care should be taken to make the reference include all that are intended to pass; for when an iron foundry and some houses were conveyed, and mention was made only of fixtures in connection with the houses, it was held that the plant in the foundry did not pass: *Hare* v. *Haton*, 5 B. & Ad. 715; *Matters* v. *Fraser*, 2 K. & J. 536; and compare *Trappes* v. *Harter*, 2 Cr. & M. 253.

The "All the estate" clause.]—Formerly it was the custom to insert after the "general words" a clause purporting to pass all the estate and interest of the grantor in the parcels. The effect of this clause was determined in all cases by the intention of the parties as ascertained by the terms of the other parts of the deed: compare *Fausett* v. *Carpenter*, 2 Dow. & C. 232; *Drew* v. *Earl of Norbury*, 3 J. & L. 284; *Stronge* v. *Hawkes*, 4 De G. M. & G. 186; and *Johnson* v. *Webster*, 4 De G. M. & G. 488. It would operate to pass the whole estate of the grantor, whether such estate belonged to him in the character in which he professed to convey, or in some other character, provided the words of the clause were sufficient, and the deed was effectual to pass the estate described by the clause: Co. Lit. 345 a. Thus if a tenant for life with remainder in tail, remainder in fee to himself, executed a grant of his life estate containing the usual estate clause, the remainder in fee would pass, and if a tenant in fee makes a lease, and then releases by a release containing this clause, all his estate passes: see *Altham's Case*, 8 Rep. 150 b., and Shep. Touchst. 98. So where a term was assigned to A. to hold from a future date, and this clause was inserted in the assignment, it was held that the clause controlled the *habendum*, and that an immediate estate passed: *Jermyn* v. *Orchard*, 1 Salk. 345. If there be no indication to the contrary in the deed, the estate clause will be effectual to pass all that it is

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capable of passing: see *Drew* v. *Earl of Norbury*, 3 J. & L. 284; *Chapman* v. *Gatcombe*, 2 Bing. N. C. 516; *Blundell* v. *Stanley*, 13 Jur. 998; *Hunt* v. *Bishop*, 8 Exch. 575; *Hunt* v. *Remnant*, 9 Exch. 635; *Francis* v. *Minton*, L. R. 2 C. P. 543; *Neame* v. *Moorsom*, L. R. 3 Eq. 91.

The intention of the deed is frequently manifested by the introductory recitals, which may contain a definite statement of what is intended to be done. Where this is the case, such a recital will control the clause under consideration. "I have always considered of late years, that where the recital is that you intend to convey certain specific property, and the general words in the habendum, including 'interest' and the like, are sufficiently large to carry other property which is not specified and is distinct from that which is specified in the recital, that other property does not pass:" *per Romilly*, M. R., in *Neame* v. *Moorsom*, L. R. 3 Eq., at p. 97; in which case the grantors were entitled to the redeemed land tax upon the property conveyed, and it was argued that the words of the grant were wide enough to pass the land tax; but it was held that inasmuch as the recitals did not refer to the land tax it was not comprised in the deed. So also in *Francis* v. *Minton*, L. R. 2 C. P. 543, where the grantor recited that he was seised in fee of one moiety of freeholds, and possessed of a lease in the second moiety and also of other leaseholds, and granted, in the most general terms, the fee of the freeholds and assigned the other leaseholds, it was held that the lease of the second moiety did not pass. On the other hand, in the case of *Young* v. *Wallingford*, 52 L. J. Ch. 590, the recitals of a mortgage mentioned only freeholds, while the parcels described the property by a definite description, which included only the freeholds, and then proceeded, "all which said several closes, pieces or parcels of land have lately been thrown together and situate in" a particular place, "and are now in the occupation of S. as tenant thereof to" the mortgagor, "or by whatever other names or descriptions the said lands have been or now are called or known, with the appurtenances

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and all the estate and interest of" the mortgagor "in the same." Part of the holding which S. held as tenant to the mortgagor was leasehold; and it was held that the mortgage included the leaseholds, as it was intended to embrace all the estate and interest of the mortgagor in the property then in the occupation of S. as his tenant: compare *Ramsden* v. *Hylton*, 1 Ves. sen. 310; *Lampon* v. *Corke*, 5 B. & Al. 606; *Turner* v. *Turner*, *Hall* v. *Turner*, 14 Ch. D. 829; and see also *ante*, pp. 129, *et seq.*

It has been held that this clause will have the effect of passing even estates vested in the grantor upon trust: see *Faussett* v. *Carpenter*, 2 Dow. & Cl. 232; *Drew* v. *Earl of Norbury*, 3 Jo. & Lat. 284; *Carter* v. *Carter*, 3 K. & J. 635. *Primâ facie* a grantor means to include in his grant all that he has to grant; and it is for this purpose that general words are introduced: *Johnson* v. *Webster*, 4 De G. M. & G. 488. This will not be the case, if there be upon the face of the deed an apparent intention that the trust estates shall not pass: *Stronge* v. *Hawkes*, 4 De G. M. & G. 186; *Rooper* v. *Harrison*, 2 K. & J. 112.

Where the form or terms of the grant contained in the deed are not apt to pass the estate, it will not pass by the clause. Thus formerly the estate clause would not pass a freehold estate, without livery of seisin or an antecedent lease for a year: *Lord Derby* v. *Taylor*, 1 East, 502; see also *Buckler's Case*, 2 Rep. 55; Co. Litt. 183 a; Shep. Touchst. 113; *Francis* v. *Minton*, L. R. 2 C. P. 543. The reason for this obviously is that if a deed were intended to have the effect of passing a freehold estate it would be framed so as to comply with the rules applicable to conveyances of freeholds.

This clause was inappropriate in appointments, as the appointor does not convey an estate, but only indicates the mode in which the use arising by the conveyance giving him his power is to vest. It is also inapplicable in underleases (*Wynnybank's Case*, cit. in *Griffin's Case*, 2 Leon. 78), as the lessor never intends to part with all his estate and interest in the term during the continuance of the underlease. The

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same argument might perhaps be thought to apply with equal force to the case of a lease. But in assignments of leaseholds the clause might have a positive value, as it would carry the whole of the assignor's interest in the property comprised in the lease, and so operate to correct any mistake there may be in the recital of the lease. Similarly it has been suggested that it might be of service in the case of a conveyance by several owners of property, where the interests of the conveying parties are wrongly described.

The 63rd section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), enacts as follows :—

Sect. 63. "(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

"(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

"(3.) This section applies only to conveyances made after the commencement of the Act."

This section will have the effect of importing into every conveyance (*h*) the "all the estate" clause,

(*h*) The term conveyance includes a "lease" (see sect. 2 (v)), but it is conceived the enactment set out in the text could not possibly have the effect of causing a lease, in which the word "convey" is used, to pass the freehold reversion by virtue of an implied "estate" clause. Even before the Act an express "estate" clause would not have had that effect in the absence of the words of limitation appropriate to the conveyance of the fee: see *Buckler's Case*, 2 Rep. 55; and it is clear that in such a case the habendum would control the premises. "If in the premises lands be letten, or a rent granted, the general intendment is that an estate for life passes; but if the habendum limit the same for years or at will, the habendum will qualifie the generall intendment of the premisses": Co. Litt. 183 a. Moreover, in such a case, apart from the rule of construction referred to, the habendum would furnish a clear indication of "contrary intention," which would prevent the reversion from passing.

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unless negatived or modified, expressly or by necessary implication, as if the clause were expressed.

7. The Habendum.

In modern deeds the habendum and the tenendum are, by force of custom, always combined. Originally there was a reason for the use of the two words "to have and to hold," as the latter served to indicate the property to be held of a superior lord.

It is not usual or correct to mark in the premises the precise duration of the estate (Shep. Touchst. 75), though commonly words of limitation adapted to the nature of the estate subsequently limited by the habendum are introduced (*i*). Thus where lands are to be conveyed from A. to B. for an estate in fee, or for an estate *pur autre vie*, A. grants to B. and his heirs the parcels, to hold to him and his heirs for ever, or to him and his heirs during the life of C., as the case may be; but the omission of the words of limitation in the premises would be quite immaterial; indeed, if the name of the grantor were here wholly omitted, and the deed simply imported that the grantor conveyed the parcels, to hold to the grantee, his heirs, &c., the validity of the conveyance would not be affected: *Butler* v. *Dodton*, Carey, 86; *Ecles* v. *Lambert*, Aleyn, 41. It is, however, better not to omit the words in question, because an error, which would be otherwise fatal in the habendum, might be corrected by the premises: *vide infra*.

The office of the habendum is to limit the grantee's estate: Shep. Touchst. 74, 75; Co. Lit. 6, a; *Buckler's Case*, 2 Rep. 55 b; and it is usually followed by a declaration of the use, and since this is executed by the statute, the releasee or grantee to uses has

(*i*) The former practice has not been followed in the forms of conveyance given in the Fourth Schedule to the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which are to be regarded as sufficient for the purposes of that Act: see sect. 57. In those forms the premises contain no words limiting the estate, such limitation being made only in the habendum.

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only an instantaneous seisin, out of which the use is served. This seisin, it has hitherto been considered, should be co-extensive with, or at all events not less, in point of duration or extent, than the use so limited. If no express use is declared, it will result to the grantor, unless there be a sufficient consideration to rebut the resulting use, in which case the estate limited to the grantee by the premises or the habendum will remain in him.

Habendum may be controlled by other parts of the instrument.

In *Strickland* v. *Maxwell*, 2 Cr. & M. 539 (a case of a lease), it was said by *Bayley*, B., that "the habendum is the proper place to look to for the purpose of ascertaining what period the parties had in their contemplation in making a lease, because it is generally the office of that part of the deed to fix the time during which the lessor grants that the lessee shall enjoy the demised premises. I agree that you may look at other parts of the instrument, and that, if you can see clearly that it must have been the intention of the parties that the lease should endure for a longer period of time than the habendum specifies, the other parts of the lease may control the habendum; but then it must be clear from those other parts of the lease, that it could not have been the intention of the parties that the habendum should operate according to the words.

As to repugnancy between the premises and the *habendum*.

With respect to the rules that obtain where the premises and the habendum are repugnant, numerous decisions and dicta are to be found in the books: see 5 Com. Dig. 168; 14 Vin. Abr. 149. Though these authorities are not all in perfect harmony, they agree for the most part in the position, that the habendum may explain or *enlarge*, but cannot *abridge*, the estate granted by the premises: *Wynnybank's Case*, cit. *Griffin's Case*, 2 Leon. 78; Co. Litt. 299 a; nor can it frustrate a grant which was complete before: *Stukley* v. *Butler*, Hob. 171; Bro. Abr. *Graunts*, pl. 154; *Leases*, p. 66; *Goshawk* v. *Chigwell*, Cro. Car. 154; *Jermyn* v. *Orchard*, Show. 206. Examples commonly adduced of the habendum being explanatory of the premises are, a grant to A. and his heirs, to hold to him and his heirs for the life of B., in

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which case A. takes an estate *pur autre vie:* Moore, 876; and a grant to A., B., and C., to hold to A. for life, remainder to B. for life, remainder to C. in fee; in which case A., B., and C. take the several estates expressed in the habendum: Dyer, 160 b; 361 b. So, under a limitation to A. and his heirs, to hold to him and the heirs of his body, A. will take an estate tail: Co. Litt. 21 a; and, says *Coke* with a doubt, a fee simple expectant. But in *Turnman* v. *Cooper*, Cro. Jac. 476; 2 Roll. 19, the authority for this position, the grant was to husband and wife, and to their heirs, habendum to them and the heirs of their bodies, remainder to them, and the survivor of them, for his life, to hold of the chief lord, with a warranty to them and their heirs; and the fee simple expectant was held to pass, expressly on the ground of the tenure limited to the lord paramount, which could not be, if it were an estate tail, and of the warranty to the heirs general. In the absence of such special circumstances there is no expectant fee: *Altham's Case*, 8 Rep. 153; Perk. s. 170. If the premises are to A. and the heirs of his body, habendum to him and his heirs, it is said that he shall take a fee simple expectant under the habendum: Co. Litt. 21 a; *Altham's Case*, 8 Rep. 154 b. In all these cases, the habendum is not repugnant to, but is explanatory of, the premises, showing for what period, or in what manner, the persons named in the premises are to take. If the premises and the habendum expressly create estates of a different nature, that which confers the larger estate will prevail. Thus, under a limitation to A. for life, to hold to him and his heirs, he would take a fee simple according to the habendum; while, in the converse case of a limitation to A. and his heirs, to hold to him for life, he would take the fee according to the premises: Co. Litt. 299 a; Plowd. 152; *Altham's Case*, 8 Rep. 56 b; 14 Vin. Ab. 140; 2 Bac. Ab. 494; the distinction being evidently founded on the doctrine, that a deed is to be construed most strongly against the grantor (*k*).

Effect of the

(*k*) Where a term of years was assigned to A. to hold from a

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But these rules have lost much of their importance since the introduction and universal adoption of uses; it is evident, that, in both the cases before suggested, if the habendum were followed by a declaration of the use, the nature of the estate which passed by the conveyance would be absolutely measured and fixed by that declaration. Thus, in the last-mentioned case, if the limitation were to A. and his heirs, habendum to A. for life, to the use of A. for life, notwithstanding the rule negativing the power of the habendum to restrict the premises, A. would take no larger estate than an estate for life, and the ulterior use would result to the grantor: *Wilkins* v. *Perrat*, Moore, 876; and the resulting of the use would not be prevented by the fact of a valuable consideration having moved from the grantee to the grantor, because such consideration would be confined to, and satisfied by, the use actually limited: *Wilkes* v. *Leuson*, Dy. 169. See also *Goodtitle* v. *Gibbs*, 5 B. & C. 719.

Repugnancy in the premises or the habendum will yield to the intention collected from the whole instrument

Questions, however, respecting the relative force of the premises and the habendum are sometimes brought into discussion by inaccuracies merely clerical, occurring in one or the other, producing a discrepancy which will necessarily render the deed void for uncertainty, unless it can be removed by the rejection or correction of the repugnant matter. In such a case, if the intention, upon the whole instrument, be apparent, any repugnant or superfluous clause or expression, in whatever part of the deed it be found, would be rejected, in order to give effect to such intention. Thus, if there be a palpable error in any part of the premises, which makes it inconsistent with the habendum, the rule often laid down, that, where the habendum is repugnant to the premises, it is to be rejected, would not prevent the Court from correcting the error in the

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"all estate" clause.

certain future event, the "all estate" clause, which was inaccurately inserted in the premises, was held to control the habendum, and have the effect of vesting the intermediate interest in the assignee: *Jermyn* v. *Orchard*, Show. P. C. 207; but see in *Burton* v. *Barclay*, 5 Moo. & P. 715.

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premises, instead of rejecting the habendum. For a direct illustration of this see the case of *Spyve* v. *Topham*, 3 East, 115.

Inconsistent words in the habendum rejected.

In the case of *Goodtitle* d. *Dodwell* v. *Gibbs*, 5 B. & C. 709, it was contended, that the conveyance was of a freehold *in futuro*, and, therefore, void. But the Court was of opinion that, in this case, an immediate express estate in fee was granted by the premises, and that the habendum, being inconsistent, and limited in terms which would defeat the deed, was to be rejected; and for this construction, they relied on the cases of *Carter* v. *Madgwick*, 3 Lev. 339; and *Germain* or *Jarman* v. *Orchard*, Skinner, 528; *S. C.*, Salk. 346; Show. P. C. 199, where the habendum was rejected on precisely similar grounds.

Partial repugnance.

This rule is part of the more general rule, that, when two parts of a deed are inconsistent, the latter shall be rejected: see *Furnivall* v. *Coombes*, 6 Scott, N. R. 522. Accordingly, the habendum will only be rejected so far as it is repugnant to the premises: so much of it as may stand with the premises will operate and control them: *Doe* d. *Timmins* v. *Steele*, 12 L. J., N. S., Q. B. 272; *Pilsworth* v. *Peyt*, 2 Sir W. Jon. 4. A lease to A. & B., habendum to A. for life, remainder to B. for life, is good, because the habendum is not inconsistent either with the premises or with the rules of law. Co. Litt. 183 b.; *Buckler's Case*, 2 Rep. 55; *Dowse's Case*, Cro. Eliz. 25, 89. But a lease to A., habendum to him and B. & C. (who are not parties) *pro termino vitæ eorum et alterius eorum successivè diutius viventium*, is void, for B. & C. cannot take immediately, being strangers, and not named in the premises; nor by remainder jointly, because they were to take successively; nor successively, because the first taker was not ascertained: *Windsmore* v. *Hobart*, Hob. 313.

Effect where limitation, either in premises or in habendum, is void *per se*.

The distinction appears to be that when the premises contain no limitation of estate, the grantor could only take an estate by implication of law, and if the habendum contain an express limitation of estate, the implication from the premises is neces-

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sarily and effectually excluded, whether the intention expressed in the habendum can take effect or not; so that the validity of the deed in that case depends upon the validity of the habendum. But, where the premises express an estate, this will not be annulled by any subsequent matter, and the habendum can only take effect if it express a legal intention not absolutely inconsistent with the premises: *Stukley* v. *Butler*, Hob. 171; *Goshawk* v. *Chigwell*, Cro. Car. 154. On the other hand, if the premises limit a freehold estate, which the deed, for want of some formality or circumstance, is incapable at the time of delivery of passing, and the habendum limit an estate for years which may pass by the instrument, the latter shall take effect though it is inconsistent with the premises. And the supplying at a time subsequent to the delivery, of the omitted ceremony, (as enrolment or livery of seisin) will not alter the construction, or divest the estate which had previously vested under the habendum. See *Baldwin's Case*, 2 Rep. 24 a.; *Buckler's Case*, 2 Rep. 55 a.; *Earl of Derby* v. *Taylor*, 1 East, 502; 2 Sanders on Uses, 154, 5th ed.

When grantee must be named in the premises.

It may be noted here that a person may take an estate by remainder who is not a party to the deed, or not named in the premises; and if no person is named in the premises, one who is named for the first time in the habendum may take an immediate estate; but, if any other person is named in the premises as grantee, no new grantee can be added in the habendum, unless in correction of an evident clerical mistake: *Brookes* v. *Brookes*, 2 Roll. Ab. 67; Vin. Ab. *Grant* (K.), Co. Litt. 7 a; Harg. Co. Litt. 26 b, n. (4); *Spyve* v. *Topham*, *supra*. Nor can a new subject-matter be added in the habendum: Shep. Touch. 76. But an exception, which must not be repugnant, may be contained in the habendum.

Declaration of use.

The habendum is usually followed immediately by the declaration of the use. Where the property being sold is transferred, subject to any specified reservation or exception, a clause is interpolated before the declaration of uses indicating the burdens

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which are to remain imposed upon the land. Thus, in the case of land subject to a rent-charge, the habendum will run "to hold, subject to the exceptions, reservations, and powers contained in the said indenture of the —— day of ——, unto and to the use of" the purchaser in fee simple.

The declaration of uses sets forth the manner in which the land is to be held and enjoyed by the purchaser; and, in some cases, the mode in which it is to descend to the purchaser's family. Thus, in conveyances of the type in common use before the law of dower was altered, the uses to bar dower were here declared. These uses are now becoming obsolete; but the declaration of uses is still very frequently necessary.

Cases in which habendum should be omitted.

Where a deed operates merely by declaration of use as an appointment under a power, a covenant to stand seised, or a bargain and sale, a habendum will not be required. Indeed, a habendum is not absolutely essential to the validity of a conveyance operating by way of grant, "For, if a man by deede give lands to another, and to his heires, without more saying, this is good if he put his seale to the deede, deliver it, and make livery (*l*) accordingly:" Co. Litt. 7 a.

Fee farm rent.

Where a conveyance is made in consideration of a fee farm rent, or it is found convenient to utilise the Statute of Uses for limiting rent-charges or terms of years as well as the fee, the habendum is the part of the deed where the proper phrases will be inserted.

Words of limitation.

The use of words of limitation apt to create the particular kind of estate which is to be conveyed by the deed is necessary. A conveyance to hold to a man simply would give to him no more than a life estate. "If one seised of land grant it to another, and say not for what time, this shall be taken as estate for his own life:" Shep. Touch. 88; see Co. Litt. 42 a, b; 183 a. In order to create an estate in fee the appropriate form was a conveyance to a man "and his heirs." Other forms of estates, such as estates

(*l*) Livery would now be unnecessary: see *ante*, p. 10.

tail male, several and general, required the use of the words "heirs male or female of the body" or "heirs of the body," while the limitations necessary to raise cross remainders in tail were intricate. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), by sect. 51 provides that— Habendum.

"In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body. Words of limitation in fee or in tail.

"This section applies only to deeds executed after the commencement of this Act."

It may be doubted whether there is much advantage to be obtained from this clause so far as regards ordinary purchase-deeds. Words of limitation must still be used; and the new statutory words of limitation do not seem to be an improvement upon the accustomed form.

The habendum serves the same purpose in all deeds, including deeds of assignment of personalty or chattels real; the only variation being that the words of limitation, if used at all, will be those which are appropriate to personal estate, instead of those applicable to the case of realty. It is usual to add in assignments the words "executors, administrators, and assigns," but this is unnecessary. The executors or the administrators take the personal estate of their testator or intestate by virtue of the common law; and it follows that an assignment of personalty to a man "absolutely," or even simpliciter, will be as effectual as an assignment to "him, his executors, administrators, and assigns." Indeed, the last word is not, even in the case of realty, a word of limitation at all, and has now no effect upon the nature of the estate or its transmissibility; for the power of the grantor to convey his estate does not now depend upon the presence or absence of the word assigns. As regards words of limitation, personalty has always differed from realty, as in the Office of habendum in conveyance of chattels.

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latter case it is necessary that the quantum of estate should be duly marked out.

Conveyance to joint tenant and tenants in common.

Care must be taken in conveying to two or more persons to make it quite clear by the form of limitation adopted, whether they are to take joint or several estates. A conveyance of personalty to A. and B., or of realty to A. and B. and their heirs, will create at law a joint estate, subject to all the incidents peculiar to that form of possession: Co. Litt. 180 b; *Aveling* v. *Knipe*, 19 Ves. 441. In equity, however, if the purchase-money is contributed by the parties in unequal shares, or if the purchase is made for purposes of business, or if the purchasers are partners, they will not be held to be joint tenants, but tenants in common: *Luke* v. *Gibson*, 1 Eq. Ca. Abr. 291; *Harrison* v. *Barton*, 1 J. & H. 287; *Robinson* v. *Preston*, 4 K. & J. 505; *Rigden* v. *Vallier*, 2 Ves. sen. 252; *Morris* v. *Barrett*, 3 Y. & J. 384; *Elliott* v. *Brown*, 3 Swanst. 489; *Houghton* v. *Houghton*, 11 Sim. 491; *Jackson* v. *Jackson*, 9 Ves. 597; *Dale* v. *Hamilton*, 2 Ph. 266; *Clements* v. *Hall*, 2 De G. & J. 175; *Steward* v. *Blakeway*, L. R. 4 Ch. 603.

The Courts will seize upon any circumstance which can be produced to show that the intention of the parties was to create a tenancy in common, and not a joint tenancy: see *Robinson* v. *Preston*, 4 K. & J. 505; *Harrison* v. *Burton*, 1 J. & H. 27; *Edwards* v. *Fashion*, 19 Ves. 444. But in practice, it is obviously not advisable to run any risk of having to produce at a later sale evidence of facts, which may then be difficult to prove; and care should be taken that the words of limitation in the conveyance are apt to the creation of such tenancy, whether joint or in common, as may be desired by the purchasers.

Conveyance on purchase by trustees.

It sometimes happens that trustees who are purchasing under a trust or power in a will, or in a settlement, are to have the legal estate in the property purchased vested in them. Where this is the case, the conveyance will be taken directly to the trustees, who will execute a separate declaration of trust, explaining that they have purchased the

property on behalf of the trust. But otherwise, the conveyance will limit the estate to the use of the beneficiaries and other persons taking interest under the trusts of the will or settlement. In some cases, it is convenient that the conveyance should be taken so as to vest the fee in the trustees, who should make a complete settlement of it afterwards; but it is more usual to incorporate the limitations in the conveyance, either by setting them out at length, or by reference. The former course is not common; but it has the advantage of enabling the conveyancer to adapt the uses of the original settlement to the events which have happened since that instrument came into operation; and to make them coincide with the circumstances at the time of the purchase. Where the other course is adopted, and the uses of the settlement are embodied by reference, care is necessary to ensure that the purchased property shall be subjected to the limitations to which it ought to be subjected, and not to recreate any estates which have been destroyed, nor to revive any powers which have been exhausted. Habendum.

It is not uncommon, specially in the north of England, for land to be conveyed in consideration of a rent-charge or fee farm rent issuing thereout; and the same plan is frequently adopted in the case of sales to public companies. The power to carry out sales in this manner appears not to be given to tenants for life under the Settled Land Act, 1882, for sect. 4 provides that sales effected under the Act are to be for the "best price," and this term seems not to include a rent-charge, or, indeed, anything but a lump sum: see *Read* v. *Shaw*, Sug. Pur. 868; and compare *Reid* v. *Shergold*, 10 Ves. 370. By the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the power to deal in this manner was confined to those cases in which land was being purchased from absolute owners: see sects. 10, 11; and by the Lands Clauses Consolidation Act of 1849 special powers of recovering rent-charges were given. By the Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106, s. 2), this Conveyance for rent-charge.

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power is extended to persons under disability; but the rent-charge must be determined in the manner prescribed by sect. 9 of the principal Act; and the rent-charge and the powers and remedies for its recovery are to enure to the uses to which the land sold was subject at the time of the sale. Powers are also given by this Act for purchasing for a rent-charge land to be used in providing for the defence of the realm; and councils of cities and boroughs have also similar powers, with the consent of the Treasury, for public purposes.

The habendum, in cases of this kind, will usually limit the land to the use first, that the vendor may receive the rent-charge, and subject thereto, to the purchaser in fee. The vendor is thus generally seised of a legal estate in the rent-charge: see Statute of Uses, 37 Hen. 8, cap. 10, s. 4.

A rent-charge thus limited can be recovered against the land for six years only: 3 & 4 Will. 4, c. 42, *Hunter* v. *Nockolds,* 1 Mac. & G. 640; though as against a purchaser who has covenanted to pay it, it may be recovered for twenty years: *Sims* v. *Thomas,* 12 A. & E. 536; *Manning* v. *Phelps,* 10 Exch. 59. If a legal rent-charge remain unpaid for the statutory period it becomes extinguished: *James* v. *Salter,* 3 Bing. N. C. 544; *Langton* v. *Langton,* 18 Jur. 928.

Habendum subject to incumbrances, &c.

Where it is intended that the property shall, in the hands of the purchaser, be subject to any incumbrances, or be qualified by any restrictions, they are usually specified between the habendum and the ultimate limitation to the purchaser; but if the statement of them is long or elaborate, it is sometimes postponed till after the limitation to the purchaser. It is merely a matter of convenience. Where trustees sold under a condition stating that the property was sold and would be conveyed subject to all free rents, quit rents, and incidents of tenure, rights of way, water, &c., if any, without any obligation on the vendors to define any such rights or claims, it was held that the vendors were entitled to insert in the habendum of the conveyance a saving of such rights in general terms, although it was not

shown or asserted that the property was subject to any such liabilities: *Gale* v. *Squier*, 4 Ch. D. 226; 5 Ch. D. 625. It is not usual to mention any subsisting leases to which the property is subject, unless they are of a beneficial or otherwise exceptional character. Habendum.

8. Covenants.

Nature and Form of Covenants.]—In strictness, a covenant is an agreement under seal. "A covenant is the agreement or consent of two or more by deed in writing, sealed and delivered, whereby either or one of the parties doth promise to the other that something is done already, or shall be done afterwards; and he that makes the covenant is called the covenantor, and he to whom it is made the covenantee:" Shep. Touchst. 160 (*m*). It may be made by deed poll as well as by indenture, provided the covenantee be named in the deed, for his acceptance of the deed is an assent to the covenant sufficient to bind him: *Green* v. *Horne*, 1 Salk. 197. So also a covenant contained in an indenture will bind a party who has accepted the deed in other matters, though he does not execute the deed: 1 Inst. 231 a; see *Willson* v. *Leonard*, 3 Beav. 173. As to covenants generally.

No particular words are necessary to make a covenant: any words will be sufficient which show the intention of the parties; thus, the word "agree" in an instrument under seal will amount to a covenant: *Pordage* v. *Cole*, 1 Wms. Saund. 319; so also a condition, declaration, or even a recital that it is agreed or intended that something shall be done may amount to a covenant: *Hollis* v. *Carr*, 3 Swan. 648; *Saltoun* v. *Houstoun*, 1 Bing. 433; *Carr* v. *Roberts*, 5 B. & Ad. 78; *Sampson* v. *Easterby*, 9 B. & C. 505; *Aspdin* v. *Austin*, 5 Q. B. 683; *Wood* v. *Copper Miners' Co.*, 7 C. B. 906; *Lacy* v. *Mottram*, 19 C. B. N. S. 479; *Rigby* v. *Great Western Rail. Co.*, 14 No particular words necessary to make a covenant

(*m*) A covenant may of course be negative, that is to say, it may be an agreement by which a party promises that something is not done already, or shall not be done afterwards.

Covenants generally.

M. & W. 816; *Adey* v. *Arnold*, 16 Jur. 1123. See further, *ante*, tit. LEASES, Vol. III., pp. 183, 184, as to the nature of covenants.

Real and personal covenants.

Covenants are divided into real and personal covenants. Real covenants are those which relate to land or other real property, or something connected therewith.

Benefit and obligation of real covenants.

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), contains some important provisions with regard to the form and effect of covenants contained in instruments made after the 31st of December, 1881. By sect. 58 of the Act, it is now rendered unnecessary that covenants should be made expressly with the heirs and assigns or the executors, administrators, and assigns of the covenantee, for the purpose of giving to the real or personal representatives (*n*), as the case may be, and assigns of the covenantee, the benefit of the covenant. So also, by virtue of sect. 59, it is no longer necessary that a covenant should be made expressly by a covenantor for himself and his heirs, executors, and administrators, according to the former practice, in order to bind such successors in title. These enactments are as follows :—

Covenants to extend to heirs, &c. (*o*).

Sect. 58. "(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

"(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

"(3.) This section applies only to covenants made after the commencement of this Act."

Covenants to bind heirs, &c. (*o*).

Sect. 59. "(1.) A covenant, and a contract under seal, and a

(*n*) It will be observed that sect. 58 relates only to land. The personal representatives of a covenantee, although not expressly named, might always sue upon a covenant relating to personalty: *Doe* d. *Rogers* v. *Rogers*, 2 N. & M. 550.

(*o*) The marginal notes to these sections are transposed in the Act.

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bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

"(2.) This section extends to a covenant implied by virtue of this Act.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

"(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act."

Joint and several covenants.

Where there are several covenantors or covenantees, the liability or benefit arising under the covenant will be joint, or several, or joint and several, according to the intention of the parties. It is of course important that such intention should be clearly expressed by the terms of the instrument, but if there is any doubt in the construction of the words used, the intention will be gathered from the nature of the interest of the parties in the subject-matter or other circumstances: see *Wilmer* v. *Currey*, 2 De G. & Sm. 347; *Beresford* v. *Browning*, 1 Ch. D. 30.

It was formerly necessary, in law, to specify in covenants with two or more jointly, that the rights under the covenant were to devolve upon the survivors or survivor of the parties with whom the covenant was made. The necessity for inserting expressions of this kind is now done away with by the 60th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which is as follows:—

Effect of covenant with two or more jointly.

Sect. 60. "(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

"(2.) This section extends to a covenant implied by virtue of this Act.

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"(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

"(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act."

Rules for framing covenants.

The effect of the above statutory enactments is greatly to simplify the form of covenants. Thus the only operative words of covenant now generally required are, "A. covenants with B.," or "with B. and C.," as the case may be; and a covenant so framed will bind the heirs, executors, and administrators of the covenantor, and entitle the covenantee and his successors in title or, as the case may be, the covenantees and the survivors of them, and the successors in title of such survivors, to the benefit of the covenant, as fully as if the old form of words had been used.

In this connexion, however, the following observations arise :—

(i.) There is nothing in the Act to make a covenant run with the land (as to which see *post*, pp. 257, *et seq.*) which would not otherwise have so run if the "heirs and assigns" or "executors, administrators, and assigns" had been expressly mentioned. Distinctions have been made in some of the cases, which will hereafter be considered, with regard to the insertion or omission of the word "assigns" in determining whether or not covenants will run with the land, but it will be seen that it is very doubtful (except in the case of leases) whether the obligation can be made to run with the land, even though the covenantor should be made to covenant for himself and his assigns. In a lease, assigns should be expressly mentioned where the covenant concerns a thing not *in esse* at the time of the grant : see *Spencer's Case*, 5 Rep. 16 ; and, indeed, in all cases where the obligation of the covenant is to run with the land : see *ante*, Vol. III., pp. 228, *et seq.*, tit. LEASES.

(ii.) It is not quite clear that the statutory provisions apply to acts to be done or consents or notices to be given, &c., under the covenant. It

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therefore seems prudent in framing covenants that, except in the operative parts thereof, the representatives of the parties should be expressly mentioned throughout.

(iii.) It is still important, in framing a covenant between several covenantors or covenantees, to indicate clearly whether the obligation or benefit of the covenant is to be several or joint, or joint and several.

Vendor generally bound to give covenants for title.

Covenants for Title.]—Covenants for title are the modern equivalents of the warranty of title by which, upon a feoffment, the feoffor, either expressly or by implication, bound himself to defend the title of his feoffee to the land comprised in the feoffment. The warranty of estates of freehold has been for a long period disused, its force having, in some cases, been restrained, in others abolished by statute. So at the present day, on a conveyance by way of sale, the vendor, in the absence of express stipulation to the contrary, is bound to enter into what are called "covenants for title" with the purchaser with respect to the property sold. Covenants for title were formerly, in the case of a sale of freeholds or leaseholds, or of personal property (when assigned by deed), inserted, as a general rule, in the purchase-deed itself. On a sale of copyholds, similar covenants were usually contained either in the deed of covenant to surrender the copyholds, or in a separate deed executed upon or immediately after the actual surrender (*p*).

(*p*) The question, what are usual covenants in *leases*, is discussed in *Church* v. *Brown*, 15 Ves. 258; and see *ante*, Vol. III., pp. 116, *et seq.*, tit. LEASES. In that case Lord *Eldon* said, "If a man covenants to sell a fee-simple estate free from all incumbrances, and says no more, it is clear that covenant carries *in gremio* the right to proper covenants." In *Browning* v. *Wright*, 2 Bos. & P. 22, the same learned judge said, "If a man purchase an estate of inheritance, and afterwards sell it, it is to be understood *primâ facie* that he sells the estate as he received it; and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestors; and if by devise, it is not unusual for him to covenant against the acts of the devisor, as well as his own."

Usual covenants.

Presumption is that they are to be restricted.

Where the vendor himself acquired the property as vendee, the

As to the extent of a

Covenants for Title.

These covenants, when entered into by a vendor who was absolutely entitled as beneficial owner, were

vendor's covenants for the title.

covenants should be confined to his own acts. Where the property was not purchased by the vendor, but by a deceased owner, from whom the same devolved to the vendor by devise or descent, his covenants should extend to the acts of such deceased owner: see *Pickett* v. *Loggon*, 14 Ves. 239. If the property were derived by the vendor from the last purchaser for valuable consideration, through several descents or wills, the covenants should extend to the acts of all the intermediate owners, though, it seems, the rule of the Court was formerly to confine the covenants to the owner who immediately preceded the vendor: *Lloyd* v. *Griffith*, 3 Atk. 267; *Wakeman* v. *Duchess of Rutland*, 3 Ves. 236. And Lord *St. Leonards* observes (Vend. 452) that a person claiming under a voluntary conveyance is considered in the same light as a devisee; but not, it is conceived, if the voluntary conveyance contained covenants for title. The reason why a vendee is entitled to covenants extending to the acts of all the vendor's ancestors and testators from the last purchaser for valuable consideration, must be, that none of these owners could have entered into covenants for title, and not that the estate passed from them without a valuable consideration. However, it seldom happens that settlements purely voluntary contain such covenants.

Covenants against acts of ancestor where there is a doubt as to who is the heir.

In *Pickett* v. *Loggon*, 14 Ves. 239, Lord *Eldon*, C., in setting aside a purchase from an heir, on the ground of pressure and misrepresentation, said, "According to the usual course, upon the conveyance of an estate derived by descent, the covenants are against the acts of the ancestor from whom it descended, and the acts of the party conveying; and, if there should have been an immediate heir, supposed to be dead, it is reasonable that the covenants should extend to his acts; but, if the sale takes place under such circumstances that it is not known whether there was an immediate heir, and the consideration is reduced in proportion to the doubt upon the title in that respect, no one would think of making the party covenant against the acts of such immediate heir, if there happened to be one, as then the conveyance would be all wrong."

Rule where vendor claims under a settlement.

Where the vendor is tenant in tail under a marriage settlement, it should be observed that, as he comes in as a purchaser for a valuable, though not for a pecuniary consideration, there seems to be no valid ground for extending his covenants to the acts of the settlor; and the settlement, if properly drawn, will have contained covenants for title by the settlor, of which the purchaser will have the benefit; and even if it does not, in strictness this is no more a reason for making the vendor's covenants extend to the acts of the settlor, than the want of covenants in the last purchase-deed (supposing the property to have been so derived) would be a ground for extending the covenants to the acts of such vendor. The practice, however, is not in complete unison with the strict rule of technical propriety in this respect; and a vendor claiming under a settlement does not often, and, perhaps, in fairness (apart

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to the effect that he had right to convey; that the purchaser should enjoy the property quietly and free from incumbrances; and that the vendor would do or execute any assurance which might be reasonably required to protect the purchaser's possession: *Church* v. *Brown*, 15 Ves. 263, 264. When these covenants are by a vendor who is beneficially interested, they extend back to the last purchaser for value; that is to say, a vendor who has himself purchased the lands, covenants only in respect of his own acts and defaults and those of persons claiming under him, but a vendor who has acquired the property otherwise than by purchase, covenants against the acts of his predecessors in title as far back as the last purchaser for value. For this purpose a title under a marriage settlement is not considered to be a title under a purchase for value; and a vendor claiming thus is usually made to covenant for in respect of the acts and default of the settlor and his representatives. If the vendor was only a limited or partial owner, it was usual that he should be made to covenant only in respect of the estate or share in the property conveyed by him.

Accordingly, on a sale by a tenant for life and a remainderman, the covenants of the tenant for life were usually limited, as regards the reversion, to his own acts and the acts of those claiming under him. In a case of joint tenants or tenants in common selling, the covenants were in most cases limited to their respective shares. So also upon a sale by husband and wife of property of the wife not settled to her separate use, the husband was made to covenant as if he were selling his own estate (*q*). The wife

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from technical considerations) ought not to object to the covenants extending to the acts of the settlor. It would appear that under sect. 7 of the Conveyancing and Law of Property Act, 1881, the covenants would extend, as it has been suggested that they should, to the acts of the settlor, for it is expressly enacted that, in the parts of that section relating to covenants in purchase-deeds, a "purchase for value shall not be deemed to include a conveyance in consideration of marriage."

(*q*) A wife's real estate is by the common law held by her husband in her right during the marriage: Bac. Abr. *Baron and Feme* (c), 1.

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also was usually made to covenant so as to bind her separate estate. Where mortgagees or trustees sold, they did not covenant for title, but as a matter of course, covenanted only that they had done no act to incumber the estate; but sometimes, in addition to the covenants against incumbrances entered into by trustees, the beneficiaries also covenanted for title to the extent of the interest taken by them. On a sale by the Court of land vested in trustees with a power to give a valid discharge, it was held that the beneficiaries could not be required to enter into any covenants for title: *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330. See *post*, p. 243.

Where a vendor is not an absolute beneficial owner, he should be careful to protect himself, by express stipulation in the contract or conditions of sale, from his obligation to enter into complete covenants for title: see *ante*, tit. CONDITIONS OF SALE, Vol. II., pp. 715, 716.

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), enacts as follows:—

Covenants for title to be implied.

"(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by such person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with such of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On conveyance for value by beneficial owner.

"(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

"That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that

Quiet enjoyment.

subject-matter shall remain to and be quietly entered upon, re-

ceived, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him and the benefit thereof, shall be received and taken accordingly, without any lawful interruptions or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands, other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his directions, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his directions, or by, through, or under any one through whom the person who so conveys derives title otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

"(In which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage)."

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Freedom from incumbrance.

Further assurance.

Other forms of covenants are provided for by the Act. These relate to a conveyance by a third party at the direction of a beneficial owner, to a

Implied covenants by direction of beneficial owner.

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conveyance by husband and wife, and to a conveyance by persons acting in a fiduciary capacity. Sect. 7 (2) provides that :—

"Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly."

It is to be noted that the directing party, if he be expressed to direct "as beneficial owner," enters by virtue of the section into the same covenants as if he, by the deed, conveyed as beneficial owner. Hence in the case of trustees conveying by direction of a tenant for life, the covenants by the tenant for life, if described as directing as beneficial owner, should be limited in the same way as if he were a conveying party as beneficial owner, so as to confine his implied covenant to his life estate only: see *ante*, p. 217.

Implied covenants or conveyance by husband and wife.

The case of a conveyance by husband and wife is provided for by sect. 7 (3), which runs :—

"(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction; and, secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife."

It has already been remarked (*ante*, p. 217) that the usual course, upon a conveyance by husband and wife of property of the wife not settled to her separate use, was to make the husband covenant as if he were selling his own property, and to make the wife covenant so as to bind her separate estate. Under this sub-section, if both the husband and the wife are expressed to convey as beneficial owners, the

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same result is achieved; for the conveyance is in that case to be read as a conveyance by the wife as beneficial owner (whereby she is made to enter into complete covenants for title which will bind her separate estate), by the direction of the husband as beneficial owner; and by sub-sect. (2), the effect of the husband's direction as beneficial owner is to make him enter into the same covenants as if he were an absolute owner conveying as beneficial owner. In addition to these two sets of covenants, there will also be implied a covenant by the husband in the same terms as that of the wife, *i.e.*, that the wife has power to convey, that the wife will ensure to the purchaser quiet enjoyment, free from incumbrances, and that she will further assure.

When a married woman conveys property belonging to her for her separate use, she will of course convey in the same way, and so enter into the same implied covenants as if she were a *feme sole*.

Covenants by persons acting in a fiduciary capacity are provided for by sect. 7 (1) (F), which enacts that:—

Implied covenants or conveyance by trustee or mortgagee.

"(F.) In every conveyance the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts (namely):

"That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."

The covenants above stated are adapted and intended to be applied to conveyances of every kind of property, real and personal.

The Act does not prohibit the employment of express covenants. If it be considered for any

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reason (*r*) undesirable to depend upon the covenants implied by the Act, covenants in the old form may still be adopted. It is to be noted that the covenants specified in the Act will be implied only when the appropriate words indicated by the Act are used. Thus, when any person beneficially interested in the property joins in the conveyance he must be expressly made to "convey as beneficial owner," or there will be no covenant on his part implied. This is provided for by sect. 7 (4), which enacts that—

"(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance."

What form of words is necessary to imply statutory covenants for title.

It is therefore quite clear that in order that the covenants may be implied in the conveyance, the words "as beneficial owner" or "as trustee," or (as the case may be) must appear in the operative part. But a question has been raised as to whether the proper phrase to be used is "conveys as beneficial owner," or whether any of the words which, by sect. 2 (v) are included in the term "convey," may be employed in its place. The sub-section is as follows:—

Definition of conveyance.

"(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance."

The point is not altogether free from doubt. There is no provision in the Act enacting conversely that all or any of the words used are to be deemed

(*r*) It may still be necessary to insert express covenants for title in conveyances of property situate in parts of her Majesty's dominions where neither the Conveyancing Acts nor any similar statutes are in force.

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equivalent to the terms "conveyance" and "convey," so as to give to the words "assignment," "appointment," &c., respectively the statutory operation and incidents attached by the Act to the terms "conveyance" and "convey." Moreover, it is obvious, on reading through the seventh section, that the word "convey" varies very materially in different parts of the section; some of the meanings given to it by sub-sect. (v) of sect. 2 being excluded, either by express terms or by implication, in one part of the section, and other meanings in other parts. On the other hand, the limiting phrase in sect. 2 (v), "unless a contrary intention appears," may have been intended to meet this difficulty, so as to permit of the substitution, in actual practice, of any appropriate word in the place of the word "convey." Upon the whole it seems prudent to employ the whole phrase used in sect. 7, and to insert in all conveyances in which it is desired to rely upon implied statutory covenants, the statement that the conveying party "conveys as beneficial owner," or "conveys as trustee," or as occasion may require.

Meaning of the word "conveys" in sect. 7 of the Conveyancing, &c., Act, 1881.

Again, the statutory covenants are implied only as against each person "who conveys and is expressed to convey as beneficial owner." It may, perhaps, be presumed that the words "who conveys" are intended to mean "who purports to convey," and on the whole (though the point does not seem to be quite clear) it is submitted that this must be the true meaning. This interpretation appears to be adopted by Messrs. Wolstenholme and Turner in "Conveyancing Acts" (4th ed.) at p. 33, where it is stated that "it is not material" whether the conveying party "actually has anything to convey;" and these learned authors suggest that a person "may be made in terms to convey simply for the purpose of giving an implied covenant." The main objection to this view, is that it seems necessary to reduce the words "who conveys" to mere surplusage, which is hardly in accordance with sound principles of construction. There is, no doubt, another possible interpretation, viz., that the words "who conveys" may mean "who *actually* conveys;"

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and it might be argued that a party who has nothing to convey ought not to be held to come within this definition. If this view be correct, the insertion of the words "conveys as beneficial owner" in a conveyance by a vendor who has no title, would be of no value whatever to the purchaser, as the conveyance would not imply any covenants on which the purchaser could sue; for one of the conditions precedent to the implication of the statutory covenants would *ex hypothesi* not exist. For instance, a person sells a reversionary interest in land (*s*) under a contract, stipulating that the purchaser shall be satisfied with declarations, or other evidence of the vendor's alleged title, which title afterwards proves to be altogether bad. Before the Act, the purchaser would presumably have been able to sue the vendor upon express covenants for title contained in the conveyance; but where there are no express covenants for title, but merely a conveyance by the vendor expressing him to "convey as beneficial owner," the result of relying on these words (according to the interpretation now suggested) would be to deprive the purchaser of his remedy by action on the covenants for title, in the very case where such covenants might be of special value. Having regard to the almost universal practice of dispensing with express covenants for title in reliance on the statute, it is submitted that, if the point should ever be raised, the Courts would be very loth to adopt a construction of the words in question, which would be productive of serious inconvenience and disturbance, and practically nullify the presumable intention of the Legislature.

Extent of words "as beneficial owner," "as trustee," &c.

Another question which arises on the construction of the 7th section of this Act is as to whether or not the words "as beneficial owner," "as trustee," &c., relate back to the words "who conveys," as well as to the immediately preceding words "is ex-

(*s*) If the vendor were in possession of the land, it would probably be held that he had something to convey, and that he actually conveyed something, if it were merely an inchoate interest as a trespasser which might in time ripen into a sound possessory title.

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pressed to convey." Assuming that the words "who conveys" merely mean "who purports" or "is expressed to convey" the question is of merely speculative interest. But, if the alternative interpretation should be correct, the point would assume some practical importance. If the words "as beneficial owner," &c., relate back, then it follows that no statutory covenants would be implied as against a person not beneficially interested, who is "expressed to convey as beneficial owner" for the purpose of giving an implied covenant; if, however, the words "as beneficial owner," &c., apply only to the immediately preceding words, the covenants would, no doubt, be implied, and would, apparently, by virtue of the words in the introductory clause of sect. 7, subsect. (1), "as far as regards the subject-matter expressed to be conveyed by him," extend, unless expressly limited, to the whole fee simple or other property expressed to be conveyed. Upon the same considerations will depend the efficacy of the practice, which is not uncommon, of making a jointress, who concurs in a conveyance to release her jointure, "convey as mortgagee," so as to imply a covenant that she has not incumbered (*t*); for it may be doubted whether a jointress is a "mortgagee" within the meaning of the Act (see sect. 2 (vi.)), and can actually convey as such, but, of course, she may be *expressed* to convey as mortgagee, if that is all that is requisite. See also sects. 15 to 30 and sect. 61 of the Act, in all of which a loan by the mortgagee appears to be implied.

Notwithstanding the points of doubt which arise upon the construction of sect. 7, it would seem that in drawing a conveyance by way of sale the statutory covenants may be relied upon in ordinary cases, in accordance with the practice now generally established. But it may, perhaps, be advisable that express covenants for title should be inserted in the conveyance, where it is desired that any person who

(*t*) On this point there seems to be some diversity of opinion and practice among conveyancers: see Davidson Prec. Conv., Vol. I., (5th ed.), p. 280; Key & Elphinstone Prec. Conv., Vol. I., p. 458, note (*f*); see also Law Quarterly Review (1886), p. 511.

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does not actually convey as beneficial owner, nor is expressed to direct as beneficial owner, should enter into such covenants; so also, that where a jointress releases her claim, she should give an express covenant against incumbrances.

Statutory covenants on conveyance by tenant for life and remainderman.

It has been said (see Wolst. and Turn. Conv. Acts, p. 33) that "in the case of a conveyance by tenant for life and remainderman, if they both convey as beneficial owners, a covenant will be implied by both as to the whole fee, joint or several, or both, according to the mode in which they convey." This would clearly be so if "conveys" means "*purports* to convey;" and even if "conveys" means "actually conveys," it is conceived that the words "as far as regards the subject-matter . . . . expressed to be conveyed by him" would extend the implied covenants by each to the whole subject-matter, that is to say, to the fee simple, unless such implied extension is expressly limited by the terms of the deed. It will be prudent, however, in the now rare case of a conveyance by a tenant for life and remainderman, expressly either to extend the covenants for title, so as to render both the conveying parties liable in respect of the whole fee, or to limit the covenants to the estates or interest conveyed by each: see sect. 7, sub-sect. (7) of the Act, *post*, p. 227.

Joint tenants.

Where several co-owners are treated as one co-owner, and join to convey "as beneficial owners," the implied statutory covenants for title would seem to be joint; and their joint covenant to be in respect of the whole property expressed to be conveyed. But if they are expressed to convey separately, each as "beneficial owner," their covenants will, apparently, be several. If it be desired to make joint tenants or others, covenant jointly and severally for title, the proper course will be to make them all convey "as beneficial owners," and each of them separately "as beneficial owner": see *ante*, p. 213.

Tenants in common.

On a conveyance by tenants in common of their respective shares, the statutory covenants will be implied by the appropriate words of conveyance, "as far as regards the subject-matter or share of the subject-matter conveyed by each;" it will, therefore,

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be important to indicate clearly in the operative part of the deed that each is expressed to convey his respective share only, so as to obtain the limitation of the statutory covenants.

The variation and extension of the covenants implied by the Act is provided for by sub-sect. (7) of sect. 7, which is as follows :—

Variation and extension of implied covenants.

"(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied and extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied."

If, therefore, in any given case, it be considered desirable to add to the statutory covenants for title, such additions will not exclude these covenants; and any modification of the covenants which may be rendered requisite by the circumstances may be inserted in the conveyance. Provisions limiting the statutory covenants in this manner will not be repugnant to the covenant, and will therefore be valid: *Williams* v. *Hathaway*, 6 Ch. D. 544; and will, moreover, not prevent the covenant, as limited, from running with the land, under sect. 7 (6): see *post*, p. 229.

Where there is only one person to whom the conveyance is made, covenants are to be made with him alone. If there are several persons who are to take under the conveyance as joint tenants, the covenants will be made with them jointly. If there are several persons so taking as tenants in common, the covenants will be several. It follows that where the conveyance is to a grantee to uses, the covenants will be made with him, as the person to whom the conveyance is made, and the benefit of the covenants will be distributed among the persons in whom the uses are executed by the statute.

Copyholds.

Another point which occurs in the consideration of the statutory covenants is that the covenants specified in sect. 7 (1) (A) and (B) will not be implied in a conveyance by way of mortgage, or in a conveyance in consideration of marriage, but that the covenants set forth in (A) may, by use of proper

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means, be incorporated in deeds dealing with copyhold or customary land. This latter point is provided for by sub-sect. (5) of sect. 7.

Sect. 7. "(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land."

Copyholds.

By sect. 2 (v), a covenant to surrender is included in the term conveyance, so that the statutory covenants may be implied by use of proper means in a covenant to surrender copyholds or customary land, but not in the surrender itself. If the conveyance is effected by a surrender without any previous deed of covenant to surrender, the purchaser is entitled to a separate deed containing express covenants for title in the ordinary form. Equitable estates in copyholds are dealt with by deed, and these deeds may be made to incorporate the statutory covenants. See also *post*, p. 335.

Leaseholds.

On a conveyance of leaseholds, in addition to the usual covenants for title by the vendor, there was usually inserted a covenant that the lease was valid and subsisting. This covenant was usually considered to be limited to his own acts and defaults, and those of any testator through whom he might claim. This covenant will also be implied by virtue of the Act. Sect. 7, sub-sect. (1) (B) is as follows:—

"(B) In a conveyance of leasehold property for valuable consideration other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

"That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the

lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance : Covenants for Title.

"(In which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage)."

The Act makes no mention of the covenant by a vendor on a sale of leaseholds in lots with each of the assignees that he will pay the chief rents and keep his purchasers indemnified in respect of the rents and covenants in the original lease. To this the assignees are entitled : *Brown* v. *Paul*, 2 Jur. N. S. 317 ; and in cases of such assignments the covenant should be inserted.

Nor does the Act make provision for the usual covenant by the purchaser of leaseholds to keep his vendor indemnified against the covenants and rents in the lease : as to which see *post*, p. 350.

It is to be observed that the covenants which are, by virtue of this section, implied in a conveyance, are to run with the land or other property taken under the conveyance. Sub-sect. (6) of sect. 7 runs— Statutory covenants run with the land.

"(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested."

In this respect the implied covenants are more valuable than those which are inserted at length in conveyances, as it depended upon circumstances whether the benefit of the covenants for title was available for those claiming under the purchaser. For example in the not infrequent case of a conveyance under a power, as the purchaser is in under the original deed and not under the deed of appointment, there was no privity of estate between himself and his appointor, and therefore the appointor's covenants for title would not run with the land : and compare *Roach* v. *Wadham*, 6 East, 289 ; *Martyn* v. *Williams*, 1 H. & N. 817 ; and *Hooper* v. *Clark*, L. R. 2 Q. B. 200. See further as to covenants running with the land, *post*, pp. 257, *et seq.*

The Lands Clauses Consolidation Act, 1845 (8 & 9 Covenants for title

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in conveyances under Lands Clauses Consolidation Act.

Vict. c. 18), contains no provision as to covenants to be entered into by a vendor to a public company. The form of conveyance contained in the Act (Schedule A.) contains no clauses or provisions in the form of or analogous to covenants for title. The Act provides that conveyances in that form or in forms "as near thereto as circumstances will admit," are to be effectual to vest the land comprised therein in the promoters of the undertaking, and to merge all terms of years attendant on the estate or interest thereby conveyed by express declaration or by construction of law, and to bar and destroy all estates tail or all other estates, rights, titles, remainders, reversions, limitations, trusts, and interests in the lands comprised in such conveyance as shall have been purchased or compensated for by the consideration therein mentioned. The advantage claimed for the form, that it saved the trouble and expense of dealing with any terms that might happen to be attendant, was destroyed by the Satisfied Terms Act, 8 & 9 Vict. c. 112. The form, therefore, has rarely if ever been used in actual practice, and the advantage of brevity can now be supplied by recourse to the Conveyancing and Law of Property Act, 1881.

Covenants by absolute owner under Lands Clauses Act.

Where a vendor who is absolute owner sells to a public company, the covenants which are inserted in the conveyance are often matter of arrangement, and are usually of the scope and type of those ordinarily used in conveyances. In some cases, however, the landowner, though absolutely entitled and apparently selling voluntarily, is not a free agent, but is acting under compulsion; and occasionally in such circumstances a vendor will object to covenant for title in the usual form. The position that an absolute owner may be practically under compulsion in selling under the Act is supported, not only by the remarks of *Hannen*, J., in the case of *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, but also by such cases as *Doe* v. *Bevan*, 3 M. & S. 353; *Slipper* v. *Tottenham R. Co.*, L. R. 4 Eq. 112; while his refusal to give covenants for title is to some extent justified by the facts that the form of Statutory Conveyance in Schedule A.

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of the Lands Clauses Act contains no covenants; and that, in case of his refusal to convey, the company can, under sect. 77, execute a deed poll vesting the property in themselves independently of any conveyance by him. There seems, however, to be no apparent reason in policy or in law why, if a landowner chooses to convey at all, he should not convey properly, and accordingly enter into proper covenants for title; and so far as authority exists upon the point it tends in the direction that the vendor must in these cases covenant: *Re London Bridge Act,* 13 Sim. 176 (which was, however, a case of peculiar circumstances, and not altogether that of an ordinary vendor under the Lands Clauses Act), and see *Harding* v. *Metropolitan Rail. Co.,* L. R. 7 Ch. 154, but the latter decision does not seem to go in terms to the length of settling the precise point under discussion.

Covenants on compulsory sale.

Where land is taken compulsorily, in form as well as in fact, the owner is probably not bound to enter into any covenants; and in practice does not do so. A conveyance in the statutory form given in the Schedule to the Act, in such cases, binds the interests of all parties concerned (see sect. 81), so that the absence of covenants on the part of the vendor seems to be of no material importance.

In conveyances by public companies of superfluous land under the Lands Clauses Consolidation Act, 1845, the word "grant," by virtue of sect. 132 of that Act, implies covenants for title upon the part of the company. It has been assumed in practice that there is no obligation upon a purchaser to accept the covenants so implied; and that he may insist upon the insertion in his conveyance of the covenants for title in the form which was then usually adopted. The covenants so implied may be varied or limited by express words, and it seems probable that if a public company should now convey by grant "as beneficial owner," the statutory covenants implied by virtue of sect. 7 of the Conveyancing and Law of Property Act, 1881, would override those implied by virtue of sect. 132 of the Lands Clauses Consolidation Act, as the words "as bene-

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ficial owner" would seem to be practically equivalent to the express words required by the last-mentioned section. The same remark applies to conveyances by public companies under the Joint Stock Companies Act (19 & 20 Vict. c. 47), which provides (sect. 46) that in conveyances by companies under its authority, covenants for title shall be implied unless the conveyance expressly provides otherwise. Under 6 Anne, c. 35, and 8 Geo. 2, c. 6, the words "grant, bargain, and sale," import covenants for title in favour of a purchaser in bargains and sales of hereditaments in Yorkshire, enrolled under those Acts. These Acts are now repealed, with a saving of existing rights, &c., by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), which contains no provision as to implication of covenants for title.

Since the 8 & 9 Vict. c. 106, s. 4, which enacts that the word "give" or the word "grant" in any deed executed after the 1st October, 1845, is not to imply any covenant at law, in respect of any tenements or hereditaments (except so far as it may do so by force of any Act of Parliament) there can be no implied covenants for title except under the several statutes above referred to (*u*).

Statutory forms under the stat. 8 & 9 Vict. c. 119.

The short forms authorized by the stat. 8 & 9 Vict. c. 119, have never been used in practice, and the Act is now repealed by the Conveyancing and Law of Property Act, 1881.

Scope of the statutory covenants for title under Conveyancing, &c., Act, 1881.

The statutory covenants set out in sect. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), appear to be framed so as adequately to meet the case of a vendor who acquired the property by purchase, or by descent, or other means: for the covenantor covenants against the acts and defaults of himself or any one through whom he derives title otherwise than by purchase for value. In these covenants a purchase for value does not include a conveyance in consideration of marriage. So that when a vendor sells property his title to which is derived through a marriage settlement, his

(*u*) In a grant of a rent-charge the word "grant" does not amount to a personal covenant to pay: *Monypenny* v. *Monypenny*, 4 Jur. (N. S.) 873.

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covenant is made to extend (in accordance with the custom prior to the Act) to the acts and defaults of the settlor, and those through whom the settlor's title is derived back to the last purchaser for value in the ordinary sense. Obviously the covenant is extended in this way, because the covenant by a settlor (see sect. 7 (1) (E)) is merely a limited covenant for further assurance. But where a settlor has in the settlement entered into proper covenants for title, it may be reasonably argued that the covenants by a vendor claiming under the settlement should be limited to the acts and defaults of those through whom he claims subsequently to such settlement: *Re London Bridge Acts*, 13 Sim. 176. If it be desired a modification of the covenants by a vendor in such a case may be effected by virtue of sect. 7 (7), *ante*, p. 227.

The covenants for title were formerly framed, as a rule, in general terms as far as regards the persons against whose acts and defaults they were intended to be available; but the purchaser's right was, if he chose, to have the persons against whose acts the vendor was to covenant specifically named in the covenants. The right was one very seldom enforced, and though in some cases the naming of the persons might be of value, it would appear that, in general, the exercise of the right was calculated to give but little advantage. The statutory covenants are framed in accordance with what was the usual practice (indeed it would have been impossible to frame them otherwise); and if a purchaser should insist upon his strict right, it would seem to be necessary to exclude the operation of the statutory covenants, and insert in the conveyance express covenants adapted to the particular case.

Limitation of statutory covenants for title with respect to outstanding estates and incumbrances.

The statutory covenants are also so framed as to provide for the case of a sale of property subject to any outstanding estate, incumbrance, or lease. In such case the estate, incumbrance, or lease, would be referred to in the parcels or the habendum, and the operation of the covenants will be so limited as to exclude from their purview the estates or incumbrances so specifically mentioned. The question what

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estates or incumbrances should thus be treated is referred to *post*, p. 242. In this respect the statutory covenants are identical in scope with the accustomed forms of express covenants.

Duty of solicitor with regard to covenants for title.

A solicitor is liable for permitting his client to execute a deed containing improper covenants: *Stannard* v. *Ullithorne*, 10 Bing. 491; but by sect. 66 of the Conveyancing and Law of Property Act, 1881, the forms and other provisions, &c., contained in the Act are declared to be proper in law, and a solicitor adopting them is expressly protected from being deemed guilty of neglect or default of duty in so doing, and also from his being liable by reason of his omitting, in good faith, to negative their incorporation in any deed. Should he, however, not rely upon these forms his liability remains as it was before the Act; and the protection afforded by the section will not extend to an omission of any proper covenant, or the improper use of a covenant relating to any matter not dealt with by the Act.

Scope and extent of covenants for title.

It may be useful to examine briefly the scope and extent of the statutory covenants for title as regards the persons against whose acts or defaults they are directed, and the limitation of their effect in respect of any incumbrances or estates subject to which the property may be conveyed; and then to point out, as far as possible, against what acts or defaults they are competent to protect the purchaser.

It was formerly necessary in all cases, and it is still necessary where express covenants for title are inserted in a purchase deed, that whatever the extent of the covenants entered into by a vendor, care should be taken in preparing them, not only that each covenant is unambiguously expressed, but that they are all made co-extensive; for inconsistencies of this kind have frequently occurred, and have given rise to much litigation (*x*).

Operation of restrictive words in covenants.

(*x*) Lord *St. Leonards* (Sugd. Vend. 603, 607) lays down the distinction that where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct, but that, where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant,

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Restrictive words in

It is to be noted that the covenants implied in conveyances, under the operation of the 7th section

unless an express intention to that effect appear, or the covenants be inconsistent.

The existence of any rule of the kind was, however, expressly denied by *Burrough*, J., in *Nind* v. *Marshall*, 1 Br. & B. 319 (but see *Gainsford* v. *Griffith*, 1 Saund. 60); and *Buller*, J., and *semble*, also, *Eldon*, C.J., in *Browning* v. *Wright*, 2 Bos. & P. 13, expressly gave as much weight to the position of these words at the end of the series as at the beginning of it. The courts have always relied on the grammatical connexion of the clauses and the particular scope of each of them, as evidencing the intention of the parties. In some cases, successive clauses relating to the title, right to convey, quiet enjoyment, &c., have been held to be so grammatically connected that qualifying words in any one part of the series, whether at the commencement or at the end, extended to the whole: *Brown* v. *Brown*, 1 Lev. 51; *Nind* v. *Marshall*, 1 Br. & B. 319; *Duke of Northumberland* v. *Errington*, 5 T. R. 522; *Sickleman* v. *Thistleton*, 6 M. & S. 9; *Hesse* v. *Stevenson*, 3 Bos. & P. 565; *Rich* v. *Rich*, Cro. Eliz. 43; in others, two members of a clause, even more intimately connected together, in point of expression, have been held to be so distinct in their objects that restrictive words in the one did not extend to the other: *Belcher* v. *Sykes*, 8 B. & C. 185; *Crayford* v. *Crayford*, Cro. Car. 106; *Howell* v. *Richards*, 11 East, 633; *Saward* v. *Anstey*, 10 Moo. 55; *Barton* v. *Fitzgerald*, 15 East, 541. In *Nervin* v. *Munns*, 3 Lev. 46, the restrictive words at the commencement of the first covenant were held to govern a subsequent covenant *in pari materiâ*, seeing that it would be inconsistent: cf. *Belcher* v. *Sykes*, 8 B. & C. 185. But, if the several clauses relate to different matters, they may differ as to their extent without inconsistency: *Norman* v. *Foster*, 1 Mod. 101; *Trenchard* v. *Hicks*, Winch, 91; 2 Roll. Abr. 250; *Crayford* v. *Crayford*, Cro. Car. 106; *Hughes* v. *Bennet*, Cro. Car. 495; Sir W. Jones, 403; *Gainsford* v. *Griffith*, 1 Saund. 51, 58; *Smith* v. *Compton*, 3 B. & Ad. 189; *Howell* v. *Richards*, 11 East, 633; *Barton* v. *Fitzgerald*, 15 East, 541; but compare *Rich* v. *Rich*, Cro. Eliz. 43; *Young* v. *Raincock*, 7 C. B. 310; *Crossfield* v. *Morrison*, 7 C. B. 286.

For cases in which restrictive words in the first covenant have been held to extend to the following clauses, where the clauses were coupled by the phrase "but that," or the like, see *Broughton* v. *Conway*, Dy. 240; *Piles* v. *Jennings*, Dy. 240 a; *Johnson* v. *Proctor*, Yelv. 175; *Anon.*, Dy. 255 a.

In *Browning* v. *Wright*, 2 Bos. & P. 13, the later of the covenants contained the phrase "in manner aforesaid," and the limiting words in the first covenant were held to extend to those subsequent to it: cf. *Hesse* v. *Stevenson*, 3 Bos. & P. 574; *Gale* v. *Reed*, 8 East, 87. In *Foord* v. *Wilson*, 2 Moo. 592; 8 Taun. 543, the subsequent covenant contained the words "notwithstanding any such act;" and it was held that these words referred

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of the Act, are qualified by restrictive words referring to any outstanding estate or liability subject to which the property is conveyed, so that so far as regards such estates or incumbrances no question can arise. The introductory words, "notwithstanding anything by the person who so conveys, or any one through whom he derives title, &c.," would appear to extend to the two subsequent covenants by virtue of the words "notwithstanding anything as aforesaid" which introduce the covenant for quiet enjoyment: see *Browning* v. *Wright*, 2 Bos. & P. 13; *Hesse* v.

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to the former covenant, and were effectual to restrict that in which they occurred; see also *Nind* v. *Marshall*, 3 Moo. 703; 1 Br. & B. 319.

Where the covenants are in effect one sentence, restrictive words at the commencement will govern them all: *Stannard* v. *Forbes*, 6 A. & E. 572; and general introductory words may extend to all subsequent covenants, though other matter intervenes: *Duke of Northumberland* v. *Errington*, 5 T. R. 522; *Kingston* v. *Preston*, cit. Doug. 681: so subsequent words may be imported into the body of the covenant: see *Sickleman* v. *Thistleton*, 6 M. & S. 9; *Horsfall* v. *Testar*, 1 Moo. 89.

It appears from these cases that restraining words in one sentence or clause would be extended to another sentence or clause, in two cases only; (1) when the grammatical construction requires such explanation, and the nature of the clauses does not oppose it, and (2) when the limiting words would be altogether deprived of any measurable effect if the general clause were allowed to stand unrestricted. In applying this last principle, it seems to have been agreed that the covenants for seisin and for right to convey have the same object, namely, to assure to the purchaser an immediate remedy upon the discovery of any defect in his title, though his enjoyment may remain undisturbed; and that the covenants for quiet enjoyment and freedom from incumbrances have also a similar intention, *scil.*, the protection only of the actual enjoyment.

For an elaborate and able consideration of the question as to the operation of restrictive words on covenants, see a note at pp. 383 *et seq.* of Vol. IX. of the last edition of this work, tit. PURCHASE DEEDS.

Presumption against absolute covenants.

It has been laid down that there is a *primâ facie* presumption against unlimited covenants for title, in a conveyance of a freehold estate, but that the presumption is considerably weaker, if it exists at all, with regard to leaseholds. It was also held to be settled law that though the words "grant," "demise," "bargain, sell," &c., in conveyances, if unrestrained, would operate as absolute covenants for enjoyment in law, they would be restrained by an express covenant of a more limited nature: *Nokes's Case*, 4 Rep. 806; *Line* v. *Stephenson*, 6 Scott, 447; *Stannard* v. *Forbes*, 6 A. & E. 572.

Stevenson, 3 Bos. & P. 574; *Gale* v. *Reed*, 8 East, 87. Covenants for Title.

The word "that" in the sentence introducing the covenants against incumbrances is a pronoun, and is a translation of the latin pronoun *hoc: Anon.*, Dyer, 255, a; Wms. R. P. 493.

The statutory covenants do not include the old covenant for seisin, or, as it was called, the covenant for title, using the latter phrase in its strictest sense; this, it appears, was practically synonymous with that for right to convey: see *Nervin* v. *Munns*, 3 Lev. 46, being of the same import and directed to the same object: *Howell* v. *Richards*, 11 East, 633; and of recent years, before the Act, it had come to be omitted: Wms. R. P. 430. In fact this covenant is included in that for right to convey; and the latter extends to cases where the former was not applicable, *e.g.*, a conveyance under a power. Covenant for seisin.

Where the covenant was that the vendor was seised of a good estate in fee according to the indenture made to him by W., this was held to be an absolute covenant: *Cooke* v. *Founds*, 1 Lev. 40; see *Freme* v. *Wright*, 4 Madd. 364. Where the covenant was that the covenantor was seised in fee, and the estate turned out to be copyhold, the covenant was broken: *Gray* v. *Briscoe*, Noy, 142. It would seem such a case as this would equally apply to the statutory covenant for right to convey, as the estate, being conveyed as freehold, would be limited to the purchaser in a manner inconsistent with the copyhold tenure, and the covenant for right to convey is that the covenantor has power to convey the subject-matter "in the manner in which it is expressed to be conveyed." What are breaches of the covenant for seisin.

The statutory covenant for right to convey would appear, in the case of a conveyance under a power, to include the covenant which, before the Act, was formerly expressed in such conveyances, that the power under which the conveyance is made is a valid and subsisting power; for unless the power be valid and subsisting, the appointor can have no right to convey (*y*). Statutory covenant for right to convey.

(*y*) The word "conveyance" includes appointment: see sect. 2 (v).

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What is a breach of the covenant for right to convey.

The covenant extends to acts done, such as the execution of deeds, and also to things omitted or knowingly suffered; and would, therefore, appear to cover cases such as bankruptcy, or becoming insolvent, or the omission to bar an estate tail, but not to anything happening by the act of God, or which the covenantor could not prevent: *Stannard* v. *Forbes*, 6 A. & E. 572; *Hobson* v. *Middleton*, 6 B. & C. 295; or the creation of incumbrances. A covenant that the vendor and some other person have right to convey is broken when that other person is under personal disability: *Nash* v. *Ashton*, Sir T. Jones, 195. The covenant, if broken at all, is broken immediately upon the execution of the conveyance; and the Statute of Limitations in respect of a breach of it begins to run as from the date of the execution: *King* v. *Jones*, 5 Taun. 418; *Short* v. *McCarthy*, 3 B. & Al. 626; *Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39.

What a breach of covenant for quiet enjoyment.

Wrongful acts.

The ordinary covenant for quiet enjoyment is merely intended to secure the undisturbed possession: *Ludwell* v. *Newman*, 6 T. R. 458; but not to guarantee to the purchaser the right to use the land for any purpose he may think fit: *Dennett* v. *Atherton*, L. R. 7 Q. B. 316; *Spoor* v. *Green*, L. R. 9 Ex. 99. The covenant for quiet enjoyment, &c., whether absolute or restricted to the acts of particular persons, it is now settled, is not broken by a wrongful disturbance by any person other than the covenantor, his heirs or executors (being named), or any person specially named in the covenant, for the law gives a direct remedy upon such a disturbance: *Hayes* v. *Bickerstaff*, Vaugh. 118; *Crosse* v. *Young*, 2 Show. 425; 2 Wms. Saund. 178, n., 181, n.; *Watkeys* v. *De Lancey*, 4 Doug. 354; 13 East, 79; *Perry* v. *Edwards*, Str. 400; *Dudley* v. *Folliott*, 3 T. R. 584; *Foster* v. *Mapes*, Cro. Eliz. 212; Hob. 35; *Kirby* v. *Hansaker*, Cro. Car. 584; *Nash* v. *Palmer*. 5 Mau. & S. 374; *Fowle* v. *Welsh*, 1 B. & C. 29; *Hall* v. *City of London Brewery Co.*, 2 B. & S. 757; *Jeffreys* v. *Evans*, 19 C. B. N. S. 246; see *Sanderson* v. *Mayor of Berwick-upon-Tweed*, 13 Q. B. D. 547; where the distinction between the

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effect of lawful and unlawful acts is very clearly shewn. And even where the covenant is only against the lawful acts of the covenantor, &c., it extends to any disturbance by him under a claim of title, and not by way of mere trespass only: *Fort* v. *Vine*, 2 Roll. Rep. 21; Vin. Ab. *Condition* (U. a.); *Crosse* v. *Young*, 2 Show. 425; *Penn* v. *Glover*, Cro. Eliz. 421; *Morgan* v. *Hunt*, 2 Vent. 213; *Lloyd* v. *Tomkies*, 1 T. R. 671; *Seddon* v. *Senate*, 13 East, 63 (on covenants in an assignment of a medicine); *Perry* v. *Edwards*, Stra. 400. In the case of *Jerritt* v. *Weare*, 3 Price, 575, *Wood*, B., relied partly on the doctrine that the covenants could not extend to the wrongful acts of strangers. A covenant against all claiming, or "pretending to claim," any right, has been held to extend to tortious entries: *Chaplain* v. *Southgate*, 10 Mod. 384; and so also of a covenant against the acts of specified individuals, or of all the world with specified exceptions: *Foster* d. *Wilson* v. *Mapes*, Cro. Eliz. 212; *Perry* v. *Edwards*, 1 Stra. 400; *Nash* v. *Palmer*, 5 M. & S. 374; *Fowle* v. *Welsh*, 1 B. & C. 29; and *Woodroff* v. *Greenwood*, Cro. Eliz. 518. It has been held that a suit in equity is no breach of a covenant against lawful eviction: *Selby* v. *Chute*, 1 Brownl. 23; Moo. 559; *Anon.*, 3 Leon. 71. But this opinion appears to have been overruled: *Hunt* v. *Danvers*, T. Raym. 370. The decree alone, without some entry upon the covenantee is not a breach: *Howard* v. *Maitland*, 11 Q. B. D. 695; see *Calthorp* v. *Heyton*, 2 Mod. 54; Vin. Ab. *Condit.* (U. a, 2). Where a lessor gave notice to the tenants of his lessee to pay their rents to him and one of them did so, it was held to be a breach of the covenant: *Hunt* v. *Danvers*, T. Raym. 371; *Edge* v. *Boileau*, 16 Q. B. D. 117. It is sufficient if the lawful enjoyment of the covenantee is materially interfered with, even though his title or possession be not otherwise affected: *Andrews* v. *Paradin*, 8 Mod. 318; *Morris* v. *Edgington*, 3 Taun. 24; *Spoor* v. *Green*, L. R. 9 Ex 99; *Sanderson* v. *Mayor of Berwick-upon-Tweed*, 13 Q. B. D. 547; see also *Thackeray* v. *Wood*, 5 B. & S. 325; 6 B. & S. 766, where it was held that the covenant extended to secure the enjoyment

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of actual easements, but not that of easements which were only apparent.

What is a disturbance by or through the means, &c., of the covenantor.

Butler v. *Swinnerton.*

Upon the construction of the words "by or through the means, title, procurement," &c., the leading case is *Butler* v. *Swinnerton* (Cro. Jac. 656; 2 Roll. R. 286; Palm. 332) where *Dodridge*, J., distinguished between the words "title" and "means" or "procurement." He said, if such a lease and covenant had been made by an original grantee in tail, ouster by the issue would have been a breach, for the descent is by grantee's means, though not by his title; but not if they had been made by issue in tail, whose issue claims neither by his means nor by his title; or by lessee for life, remainder over, and the remainderman entered. But, if he had enfeoffed upon condition to be enfeoffed for life, remainder over, the entry of the remainderman would have been a breach. So, if the lessor had been tenant in fee, and his widow had entered for dower: *Anon.*, Godb. 333; but not if his mother had entered for her dower. So, where there was a disturbance by a person claiming under a prior appointment made by the covenantor, though the covenantee had not the seisin of the estate: *Hurd* v. *Fletcher*, Doug. 43; *Evans* v. *Vaughan*, 4 B. & C. 261, 267; or by a person claiming under an exercise of a joint power, the covenantor being one of the donees: *Calvert* v. *Sebright*, 15 Beav. 156; and cf. *Carpenter* v. *Parker*, 3 C. B. N. S. 206. And of course a covenant in a lease (whether for years or for lives) for enjoyment "during the said term" means, not the term which the lessor is capable of granting, but that which he professed to grant: *Wright* v. *Cartwright*, Burr. 282.

What are "acts or means" of the covenantor.

But "the word 'acts' means something done by the person against whose acts the covenant is made, and the word 'means' has a similar meaning—something proceeding from the person covenanting;" and, therefore, where the sub-lessee was not informed by the mesne lessor of a clause in the original lease against carrying on trade in the premises, and underlet to a tenant who incurred a forfeiture by doing so, it was held to be no breach of the original lessor's covenant against eviction, &c., by or from her, or by

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or through her acts, means, right, title, forfeiture, privity, or procurement: *Spencer* v. *Marriott*, 1 B. & C. 457; *Dennett* v. *Atherton*, L. R. 7 Q. B. 316.

"Default" in not having suffered a recovery.

Where a tenant in tail in possession, conceiving that he was entitled to the fee-simple under an appointment, which turned out to be void, made leases reciting that he was seised of an estate of freehold and inheritance in the premises, and covenanted for quiet enjoyment against himself, his heirs, executors, administrators, or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his, their, or any of their acts, means, default, or procurement, Lord *Loughborough* said, it was clear that, if the lessees were evicted by title paramount (*i.e.* such title as the lessor could have barred by recovery), they might have satisfaction from his assets on the covenant. But his lordship declined to relieve specifically by raising a case of election against the issue in tail, who was interested in the lessor's assets: *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544; see also *Howes* v. *Brushfield*, 3 East, 491; *Stanley* v. *Hayes*, 3 Q. B. 105. Whether the covenant extends to past occurrences or to future ones only depends upon the words: *Lewis* v. *Hilliar*, 2 Rep. 501, 377; *Shaw* v. *Stenton*, 2 H. & N. 258; *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602.

Accepting defective title not a "neglect or default."

But accepting a title with knowledge that it is defeasible, even from parties who may be able to make it absolute, is not a "neglect or default" within the meaning of those words as used in covenants for title: *Woodhouse* v. *Jenkins*, 9 Bing. 431; see *Costigan* v. *Hastler*, 2 Sch. & L. 160; and *Hobson* v. *Middleton*, 6 B. & C. 295. It is clear, however, that the vendor may be made answerable in equity beyond his liability under the covenants for a defect of title known to and fraudulently concealed by him: *Edwards* v. *M'Leay*, G. Coop. 308; 2 Swanst. 289; *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542; *Vigors* v. *Pike*, 8 Cl. & F. 562.

Meaning of the words "permit or suffer."

The word "suffer" has in this covenant a passive sense: *Anon.*, Dyer, 255, a; *Broughton* v. *Conway*, Dyer, 2, 260; *Roffey* v. *Bent*, L. R. 3 Eq. 759.

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Acquiescence in an act, which the covenantor could not have prevented, is not within a covenant that he had not done or executed, or knowingly or willingly permitted or suffered to be done, any act whereby, &c.: *Hobson* v. *Middleton*, 6 B. & C. 295; nor does the covenant extend to such matters as are caused by the act of God, as the death of a *cestui que vie*: *Stannard* v. *Forbes*, 6 A. & E. 572.

Hobson v. *Middleton.*

Scope of statutory covenant for quiet enjoyment.

The statutory covenant for quiet enjoyment will, it appears, extend only to lawful acts done under claim of title, though the acts may have the effect of interfering only with the possession and enjoyment of the property, leaving the title to it otherwise unimpaired (*ante*, p. 239). The covenant is against acts, &c., done, &c., by the person who conveys, &c., or by, through, or under him, and so forth, and would appear sufficiently wide to be available in the case of disturbance by any means except by title paramount that of the covenantor, a case which would seem to fall within the scope of the covenant for right to convey; unless, indeed, the paramount title is one which might have been destroyed by the covenantor, in which case it would apparently be covered by the covenant now under consideration: *ante*, pp. 238, 240.

What should be excepted out of the vendor's covenant against incumbrances.

It is not usual to except tenancies from year to year at rack rent in a covenant which avers the freedom of the property from incumbrances; but, as such a tenancy constitutes an interest in the land which does not pass by the conveyance, it is obvious that, if created by the vendor himself, or any other person to whose acts his covenants extend, the estate of a tenant from year to year ought to be excepted.

Perhaps in no part of deeds has so much inaccuracy prevailed as in framing exceptions of this nature. Thus, while a tenancy, though an interest created by the covenantor, has not been noticed, a great variety of incidents not created by him, as land tax (*z*), quit rents, manorial rights, &c., have

(*z*) A distress upon a tenant for land-tax, which the lessor ought to have paid, has been held to be no breach of a covenant for quiet enjoyment without disturbance of or by the lessor, his heirs

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been not unfrequently introduced. It is clear that no subsisting charge or outstanding interest needs to be noticed as an incumbrance, which was not created by the person to whose acts the covenant relates. The effect of referring to an incumbrance paramount the original estate of the vendor, has been held to render absolute covenants which otherwise would have been limited: *Howell* v. *Richards*, 11 East, 633. Where the covenants were absolute, as against the acts of all persons, and rents were mentioned among the incumbrances from which the estate was warranted, it was held that small quit rents were within the covenant: *Hammond* v. *Hill*, 1 Com. 180.

The statutory covenant against incumbrances.

The question what incumbrances or estates are to be excepted from the covenant will hardly arise under the statutory covenant, which excepts from its operation only all such estates, incumbrances, claims, and demands, subject to which the property is expressed to be conveyed; and the estates and incumbrances against which the statutory covenant is to protect the purchaser are specified to be those made by the vendor himself or those against whose acts he covenants.

Covenant for further assurance.

The well-known rule is, that trustees or mortgagees, or a trustee in bankruptcy, need not enter into any other covenant than that he has not incumbered: *White* v. *Foljambe*, 11 Ves. 537, at p. 345; *Staines* v. *Morris*, 1 Ves. & B. 12 (*a*). In *Wooly* v.

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or assigns, or any person claiming by, from, or under him, them, or any of them, on the ground that it was made by one claiming against him: *Stanley* v. *Hayes*, 2 Gale & D. 411. This seems a narrow construction. The distress would have been illegal but for the default of the lessor (and act and default are the same thing for the purposes of these covenants), so that the disturbance was by one claiming by the lessor, and through him, that is, through his act: see *Howes* v. *Brushfield*, 3 East, 491. So, it is clear that where a lessee underlets part of the premises, and commits a forfeiture, this is a breach of a covenant against disturbance by him, or any person claiming by, from, or under him, and yet, notwithstanding the distinction taken by the Court in *Stanley* v. *Hayes*, the entry is by title paramount: see *Dawson* v. *Dyer*, 5 B. & Ad. 585; *Ireland* v. *Bircham*, 2 Scott, 207.

(*a*) Where a purchaser is to be debarred from requiring complete covenants for title, his right should be expressly negatived in the contract or conditions of sale: *Re London Bridge Acts*, 13 Sim.

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Frampton, 5 Ha. 560, which was a case of an attempt by a purchaser to compel trustees to enter into a covenant for further assurance, it was said that according to established practice the Court could not compel the trustees to do more than enter into the usual covenant that they had done no act to incumber the property; but a doubt was expressed as to whether, in the converse case of a trustee refusing to covenant for further assurance, and endeavouring to compel the purchaser specifically to perform his contract, the trustee would not be decreed to enter into the covenant as the condition of success: see also *Onslow* v. *Lord Londesborough*, 10 Hare, 67, at p. 74; *Copper Miners' Co.* v. *Beach*, 13 Beav. 478; *Starr* v. *Burges*, 4 K. & J. 45, at p. 57. It was explained in *Hodges* v. *Blagrave*, 18 Beav. 404, that the reason for the limitation of the trustee's covenants is to avoid making the trustee personally responsible; and the difficulty is to make the purchaser secure without imposing this liability on the trustee. In the case of a sale by mortgagees where the purchase-money goes into their hands, and, in a qualified sense, for their own benefit, there seems good reason to consider it not unreasonable to require such a covenant from them. Indeed the actual operation of the covenant is nothing more than an engagement by a person who has already proposedly conveyed property, to execute a further assurance in case the present conveyance should prove to be defective, at the expense of the person requiring such further act. Though this view of the fairness of the covenant remains true, it is extremely improbable that it will in the future be possible to obtain a covenant to this effect from a mortgagee vendor; for the ordinary practice of inserting only the covenant against incumbrances has been sanctioned by the legislature in the Conveyancing and Law of Property Act, 1881, sect. 7 (1) (F.) of which classes together trustees, mortgagees, and other persons conveying in a fidu-

176; *Earl Poulett* v. *Hood*, L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract*, W. N. 1884, p. 192; *S.C.*, 51 L. T. 356; 33 W. R. 26: see *ante*, Vol. II., p. 715.

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ciary capacity, and enacts no more than that the covenant implied by them shall be that against incumbrances.

Where counsel must advise assurances to be executed.

Where the covenant was to make such assurances as the counsel of the covenantee shall advise, the assurance required to be executed had to be shown to have been advised by counsel: *Bennet's Case*, Cro. Eliz. 9; *Rosewell's Case*, 5 Rep. 19 b. But it was not necessary that the advice should be given directly to the covenantor: *Higginbotham's Case*, 5 Rep. 20 a. A distinction was taken, in one of the cases, between the words "advise" and "devise;" the former, it was thought, only requiring that counsel should advise generally on the nature of the assurance, the latter, that he should prepare the instrument tendered for execution: *Stafford's Case*, Moore, 595; *Stafford* v. *Bottorne*, Cro. Eliz. 298; see 9 Moo. 215. Where the covenant was to execute such an assurance as will satisfy the covenantee's counsel, the covenantor had to tender the assurance: *Baker* v. *Bulstrode*, 2 Lev. 95; but where it was to make such assurance as the covenantee's counsel should advise, the covenantee had to tender the deed: *Lamb's Case*, 5 Rep. 22. These old forms of the covenant have now become quite obsolete, and the covenant has for many years past been framed so as to give the right to the covenantee to have such an assurance as he may reasonably require.

What may be "reasonably" required under the covenant for further assurance.

What is a "reasonable act" within the meaning of the covenant for further assurance has often been the subject of controversy. In an early case it was held, that a bond for the performance of covenants, one of which was that A. at all times, at the request and charges of B., should make, execute, and suffer such reasonable assurances of certain lands to B., or his heirs, as he or they should reasonably require (which words extended to the levying of a fine or removal of a judgment, &c.: *King* v. *Jones*, 5 Taunt. 418), was not broken by the neglect to levy a fine, which was prevented by A. having become *non compos mentis*, on account of which the justice of assize refused to take her acknowledgment: for it was said, "the words are general, to make such reasonable

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assurances, which, &c.; but if the words had been special, to acknowledge a fine, there, if the justice doth refuse to take such acknowledgment, the bond is forfeited, for the party hath taken upon him that it should be done:" *Pet* v. *Cally*, 1 Leon. 304. But even where the covenant is expressly to levy a fine, severe sickness, according to another authority, excuses for the non-performance of it: *Nash* v. *Aston*, Sir T. Jo. 195; *Anonymous Case* in Moore, 124.

Refusal to do an "unnecessary act" no breach.

The refusal to do an unnecessary act is not a breach of the covenant in question. Thus, where certain lands had been demised to trustees upon trust, among other things, to raise at a contingent but eventual period 1100*l.*, to be paid to one, or to his wife and children; and the covenant for further assurance extended to the doing all other lawful and reasonable acts and assurances in the law, for further, &c. (among other things), raising the said 1100*l.* according to the intent of the indenture, as by the payee or his counsel should be advised and required: the Court declared that the covenantor was not bound to comply with a request that he should direct the trustees to take up at interest the 1100*l.* and pay over the same, because such an act was an unnecessary act, and therefore not a reasonable act, or one which would be required by law, and consequently not within the terms of the covenant stated: *Warn* v. *Bickford*, 9 Price, 43; see also *Boulney* v. *Curteys*, Cro. Jac. 231; and *Pudsey* v. *Newsam*, Yelv. 44.

Opportunity should be given to the covenantee to examine the assurance required to be executed.

A covenantor called upon to make further assurance, should have an opportunity of examining the contents of the instrument he is required to execute; and it would be prudent to send him the draft of the intended instrument, for perusal, according to the present course of practice: see *Bennet's Case*, Cro. Eliz. 9; *Manser's Case*, 2 Rep. 3; 4 Leon. 62.

It seems, that if a man undertakes to make an assurance by a certain day, he is bound to do it without any request or tender of any assurance: *Halling* v. *Connard*, Cro. Eliz. 517; *Lamb's Case*, 5 Rep. 22; see *Blicke* v. *Dymoke*, 9 Moo. 203; though

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if an assurance be tendered he must execute it; and, in the latter case, even if it is to be at the costs of the covenantee, the first act must proceed from the covenantor, namely, to notify to the covenantee what manner of assurance he will make: Shep. Touch. 167; 11 Mod. 400; Holt, 177; *Heron* v. *Treyne*, 1 Ld. Raym. 750.

This reasoning, of course, only applies where the covenant does not specify the nature of the assurance; but see *Halling* v. *Connard;* but, where it does, it would be advisable for the covenantor to intimate his readiness to perform the covenant on receiving the costs.

As to executing distinct assurances.

Another distinction laid down in the early authorities is, that where the covenantor binds himself, at his own costs, to make such an assurance of all his land, as another shall devise and require, he is not obliged to execute several assurances of distinct parts; but, *contra*, where the assurances are to be at the costs of the person requiring them: *Washington* v. *Burgon*, Moo. 570. But questions of this nature are precluded by the modern form of the vendor's covenant for further assurance, which throws upon the purchaser, as well the expense of preparing, as the task of devising and tendering the assurances to be executed. When the covenant is silent as to the costs of the assurance, it seems they must be paid by the party to whom it is made: *Goldney* v. *Curtiss*, 1 Bulst. 90.

What may be required under covenant for further assurance.

It has been held that covenants for title are not part of an assurance, so as to make it incumbent upon the covenantor to execute an assurance with covenants: *Coles* v. *Kinder*, Cro. Jac. 571. So also in *Stanroyde* v. *Locock*, Cro. Jac. 115, it was held that a covenantor was not compellable under such a covenant to give a bond in a penalty for the quiet enjoyment of the land. It must be noted that in neither of these cases was the covenant contained in a conveyance, but in each it was a covenant in consideration of the purchase-money, to assure the land: in other words, they were cases of formal contracts for sale and conveyance, and would certainly not now be followed, as a contract to sell would

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now (even as long ago as *Lassels* v. *Catterton*, 1 Mod. 67) be held to carry with it a contract to give proper covenants for title: *Church* v. *Brown*, 15 Ves. 258, at p. 263, and cases cited in the note. Therefore, in an assurance under the covenant for further assurance, the covenantor must, it is conceived, in suitable cases, give such covenants as would be necessary and proper in a conveyance on sale. Presumably, where the assurance is a conveyance, the covenantor would be compellable to procure the conveying parties to enter into, at least, the statutory covenants. Thus, when under the covenant, it should be necessary for the covenantor to procure a conveyance by trustees, he would, it is considered, be bound to obtain from the trustees the usual covenant that they had not incumbered.

Whether a disentailing assurance can be required.

The covenant for further assurance appears to be intended only to secure to the covenantee the precise estate or interest purported to be conveyed to him by the deed in which the covenant is contained. Thus, where a tenant in tail, conveying as absolute owner, purports to convey in fee simple, the covenant may be extended so as to include a deed barring the estate tail; but when the fact that the party conveying is only tenant in tail appears upon the deed, and there is nothing to show that it was the intention of the parties that the base fee created by the deed should be enlarged, it would appear to be at least doubtful whether the covenantee could compel the covenantor to bar the estate tail. At any rate, *Stuart*, V.-C., in *Davis* v. *Tollemache*, 2 Jur. (N. S.) 1181, refused to exercise the extraordinary jurisdiction of the Court in such a case by compelling the specific performance of the covenant. Where the nature of the transaction or the words of the covenant show that the intention was that the covenantor should have the fee, the covenant will be enforced: see *Bankes* v. *Small*, 34 Ch. D. 415, where the covenant for further assurance mentioned "every such disentailing or other assurance."

It appears doubtful whether the covenantee, under the covenant, is entitled to demand subsequently a covenant for production of deeds: *Fain* v.

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Ayers, 2 S. & S. 533 (*b*): to allow him to do so would be to enable him to obtain protection or evidence which he ought to have obtained at the date of the conveyance: see *Hallett* v. *Middleton*, 1 Russ. 243.

Covenant for further assurance, how broken.

But, on the other hand, where the contract between the parties shows that such a matter was contemplated, the covenantee will be compelled to make further assurance of any interest he may acquire in the estate subsequently to the conveyance, even though he acquire it by purchase: *Taylor* v. *Debar*, 1 Ch. Ca. 274; 2 Ch. Ca. 212; where it was held that where a bad title is sold with a covenant for further assurance, and afterwards the vendor purchases a good title, he will be decreed to convey the part to which he thus acquires a good title: *Pye* v. *Dalebury*, 3 Bro. C. C. 595; *Ex parte Fripp*, 1 De G. 293; *King* v. *Sims*, 5 Taun. 427; *Heath* v. *Crutwell*, L. R. 10 Ch. 31. But the right to compel the vendor to make perfect a defective title appears to depend upon an equity which has no connection with any legal claim arising out of the covenant for further assurance: *Noel* v. *Bewley*, 3 Sim. 116; *Seabourne* v. *Powel*, 2 Vern. 11; *Jennings* v. *Blincorne*, 2 Vern. 609; *Jones* v. *Kearney*, 1 Dru. & W. 151; though it may be enforced under the covenant: *Noel* v. *Bewley*, 3 Sim. 116; *Smith* v. *Baker*, 1 Y. & C. C. C. 223. In the former of these two cases a mortgagor conveyed a contingent remainder in fee, and covenanted for further assurance: the remainder was bound by the tenant for life, and the mortgagor was held liable, in equity, to perfect the security out of an interest which he took under the will of the tenant for life. In the latter case, an action upon the covenant for further assurance in a conveyance by a vendor who was assumed to be entitled in fee, but, in fact, was not entitled at all, the vendor was compelled to convey the estate to which he subsequently became entitled as heir-at-law. The first case appears to be strictly a case of estoppel, and of the enforcement of the equitable

(*b*) The marginal note to the report of this case is clearly inaccurate.

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Vendor absolutely entitled.

Where a vendor is absolutely entitled to property, he has, as a rule, possession also of his deeds, and can either hand them over to the purchaser on completion, or, if he be disposing of a part only of his property, he can, as a matter of course, give the requisite acknowledgment and undertaking. The case of a sale of land of any tenure in lots, and the destination of the deeds in such instances has been considered *ante*, Vol. II., p. 723, and does not appear to require any further remark in this place.

When deeds relate to several estates.

It has been assumed (Sug. Vend. 463), but never decided, that when deeds relate to several properties, and the owner of one of the estates has entered into a covenant to produce them, the obligation of such covenant will, in equity, run with the land, or rather with the deeds, so as to bind the deeds into whose soever hands they may come. It has been supposed that this doctrine is inconsistent with what fell from Sir *J. Leach*, V.-C., in the case of *Barclay* v. *Raine*, 1 S. & S. 449 : but this point did not then arise, and the expressions attributed to the learned judge were subsequently repudiated by him (*d*). The point actually determined in that case was that, even when it is clear that an equitable right to call for production of deeds exists, a purchaser is not compellable to rely upon it, but is entitled to a covenant for production of all deeds material to his title, which are not placed in his possession ; and that the circumstance that he cannot have either the deeds or such a covenant, afforded sufficient ground for resisting the performance of the contract. The absence of a legal covenant, when the equitable right to production exists, is no longer an objection to the title : see Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78, s. 2 (3)), and *ante*, Vol. II., p. 634. But the right of a purchaser, subject to the provisions of the Act, to the delivery of the deeds, or to a covenant or its equivalent by his vendor, remains.

(*d*) See note at p. 98 of Vol. IX. of the third edition of the present work.

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When land is held by several owners under a common title, he who can get possession of the deeds is entitled as against his co-owners to keep them: *Foster* v. *Crabb*, 12 C. B. 136; but it may be taken to be certain that a part owner in possession may oblige the owner of any other part of the lands who has the deeds to produce them: *Lord Banbury* v. *Briscoe*, 2 Ch. Ca. 42; *Att.-Gen.* v. *Lambe*, 3 Y. & C. 162; 12 Jur. 386; *Shore* v. *Collett*, 9 Coop. 234; *Hercy* v. *Ferrers*, 4 Beav. 97; *Combe* v. *City of London*, 4 Y. & C. Ex. 155; *Wilson* v. *Forster*, M'Clel. & Y. 274; *Brigstocke* v. *Mansel*, 3 Madd. 47; *Riccard* v. *Inclosure Commissioners*, 1 E. & B. 29; and see *Fain* v. *Ayers*, 2 S. & S. 533. See also the case of *Elton* v. *Elton*, 11 Jur. (N. S.) 136, a case where coparceners were concerned. But where a tenant in common had sold his shares and taken a conveyance back by way of mortgage, Lord *Eldon* held that he was protected from producing the deeds to enable the owner of the other share to sell, on the ground that a mortgagee has no right to show his mortgagor's title: *Lambert* v. *Rogers*, 1 Mer. 487; *Greene* v. *Cooper*, Wigram on Disc. 246.

When vendor is joint tenant or tenant in common.

When vendor is a remainderman.

The remainderman appears as a rule not to be entitled to production of deeds which are in the hands of the tenant for life, and consequently not in a position to enter into an engagement for their production to a purchaser of his interest. In *Noel* v. *Ward*, 1 Madd. 322, the mortgagee of a contingent remainderman in fee was not allowed to have inspection of the deeds in the hands of the tenant for life, in order to enable him to make a sale. The application of a vested remainderman, who wished to mortgage his interest, for liberty to inspect the title deeds, was refused in *Shaw* v. *Shaw*, 12 Price, 163; see also *Smith* v. *Cooke*, 1 Atk. 382; *Ivie* v. *Ivie*, 1 Atk. 429; *Pyncent* v. *Pyncent*, 3 Atk. 571; *Lord Lempster* v. *Earl Pomfret*, Dick. 238; *Garner* v. *Hannyngton*, 22 Beav. 444. The production may be enforced, however, for such purposes as the Court may consider to be proper: *Davis* v. *Lord Dysart*, 21 Beav. 124.

Contingent remainderman.

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When vendor is a mortgagor.

If the vendor be a mortgagor, whose deeds are in the possession of his mortgagee, he can only obtain them from him on payment of all that is due thereunder: *Smith* v. *Pawson*, 25 L. T. 40; *Chichester* v. *Marquis of Donegal*, L. R. 5 Ch. 497. In the case of *Patch* v. *Ward*, L. R. 1 Eq. 436, it was held that the mortgage deed itself, being the evidence of the mortgagor's right to redeem, as well as part of the mortgagee's title, must be produced for the inspection of the mortgagor; but this decision appears to conflict with the case of *Brown* v. *Lockhart*, 10 Sim. 421; and in the judgment in *Chichester* v. *Marquis of Donegal*, L. R. 5 Ch. 497, no such distinction was taken between the mortgage deed itself and the prior instrument; and it would therefore seem that the general right of the mortgagee to "put his deeds into a box and sit upon it" until his money is tendered to him (*e*), applies to the mortgage deed as well as to the other deed. There are exceptions to this rule, as for instance, when a mortgagee has led the mortgagor to anticipate that he will produce the deeds, he cannot afterwards refuse to do so: *Crosse* v. *Reversionary Society*, 3 De G. M. & G. 712; and a mortgagee who consents to a sale under an order of the Court, must bring the deeds into Court: *Livesey* v. *Harding*, 1 Beav. 343. Of course the rule holds only as between the mortgagor and the mortgagee: when the claim for production is made against the mortgagee of one who would himself be compellable to produce the deeds, the mortgagee cannot resist the demand: *Hercy* v. *Ferrers*, 4 Beav. 97; *Balls* v. *Margrave*, 4 Beav. 119; *Muston* v. *Bradshaw*, 15 Sim. 192; *Rumbold* v. *Forbreath*, 3 K. & J. 44; unless he can protect him-

(*e*) As to the right of a mortgagee to retain all documents of title in his hands until he is paid off, see (in addition to the cases cited in the text) *Anon.*, Mosel. 246; *Sparke* v. *Moutrion*, 1 Y. & C. Ex. 103; *Addison* v. *Walker*, 4 Y. & C. Ex. 447; *Lloyd* v. *Wait*, 12 Sim. 103; *Danver* v. *Lord Portarlington*, 15 Sim. 580; *Phillips* v. *Evans*, 2 Y. & C. C. C. 647; *Greenwood* v. *Rothwell*, 7 Beav. 291; *Crisp* v. *Platel*, 8 Beav. 62; *Cannock* v. *Jauncey*, 1 Drew. 497; *Johnson* v. *Tucker*, 11 Jur. 383; *Bycroft* v. *Sibel*, 20 L. T. 197; *Davis* v. *Perry*, 27 L. J. Ch. 294.

self as having been a purchaser without notice: *Wallwyn* v. *Lee*, 9 Ves. 24 (overruling *Strode* v. *Blackburn*, 3 Ves. 222); *Joyce* v. *De Moleyns*, 2 I. & L. 374; *Francis* v. *Francis*, 5 De G. M. & G. 108; *Heath* v. *Crealock*, L. R. 10 Ch. 22. Covenants, &c., for Production of Deeds.

The other questions of a cognate nature, as to the right of the heir-at-law, or the heir of entail, or other persons, to production and inspection of deeds, appear to be connected rather with actions and the purposes of actions than with conveyances, and seem not suitable for discussion in this work. Heir-at-law, &c.

Of course the solicitor or agent for a party (as an auctioneer) may be ordered to produce a document which would have been liable to production in the hands of his employer: *Morrow* v. *Saunders*, 3 Moo. 671; *Gigner* v. *Bayley*, 5 Moo. 71. Solicitors, &c.

The covenant for production, and its equivalent, the acknowledgment of the right to production, usually does not extend to deeds and documents, which are of record. Copies of court roll, which are in the vendor's possession, must be handed over, or a covenant must be given for their production: *Dun* v. *Tucker*, 6 Ves. 460; *Cooper* v. *Emery*, 2 Ph. 388: see also the observations of Lord *St. Leonards*, on the case of *Campbell* v. *Campbell* (Rolls, 1793, M. S.), cited Sugd. Vend. 447. Court rolls are not part of the actual title, but are the records of leases for heirs, subject to which freeholds held of the manor are being sold; they must be covenanted to be produced; *Earl Poulett* v. *Hood*, L. R. 5 Eq. 330. Deeds and documents not usually included in covenants, &c., for production.

The covenant usually extends only to the positive evidence of title; but it has been held, that where the vendor is the heir-at-law, whose ancestor has made a will which does not affect the land, he is bound to covenant for the production of the will, if it be in existence, for the satisfaction of the purchaser and any purchaser from him: see *Stevens* v. *Guppy*, 2 S. & S. 439; Sugd. Vend. 452. Negative evidence.

Where the covenantors were vendors selling in a fiduciary character, the covenant was usually, and properly, limited by a proviso, that their liability under the covenant should be confined Covenants, &c., by fiduciary vendors.

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to the period during which they actually had the deeds in their custody. Under the statutory acknowledgment, it would seem that no such limitation need now be inserted; for by sub-sect. (2) of the section, an acknowledgment of the right to production binds the documents in the hands not only of the person giving the acknowledgment and retaining them, but also of every other person having possession or control of them from time to time; but each individual possessor or person is bound so long only as he has actual possession or control of the documents. See further on this question, *ante*, sub-tit. ACKNOWLEDGMENT, Vol. I., p. 255.

Whether covenant runs with land.

The question whether the obligation of a covenant for production of deeds will run with land, is not altogether free from doubt; and in any case, it would appear that it will not do so unless it is made by the legal owner of the land to which it is desired to annex it. Thus where the land is sold by one who took the conveyance to himself under uses to bar dower, the covenant cannot run with the land, if the conveyance be made by him under his power of appointment: *Roach* v. *Wadham*, 6 East, 209: see *post*, p. 263. The point seems now to be practically of little importance, as the statutory acknowledgment expressly binds the deeds in the hands of the person retaining them, and of every person who has possession or control of them from time to time: see sect. 9, sub-sect. (2).

When vendor has covenanted for the production.

If upon a sale an acknowledgment of the right to production and undertaking for safe custody has been given, and the vendor subsequently sells the land in respect of which the deeds were retained, and hands the deeds to the subsequent purchaser, it would appear, from sub-sects. (2) and (11) of the 9th section, that the deeds will be bound in the hands of such subsequent purchaser; and that the vendor could not, on the ground of any continuing liability under the acknowledgment or the undertaking, refuse to hand over the deeds. It was formerly thought (Sug. Vend. 435), that he might be entitled to do so, unless he was entitled, either under the terms of his cove-

nant, or by the consent of his covenantee, to substitute the liability of the subsequent purchaser for his own. In cases not governed by the 9th section, the old rule would seem to apply, though the substituted covenant would now take the form of an acknowledgment and undertaking under the section.

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Whether an acknowledgment and undertaking can be required from a vendor under the covenant for further assurance, see *Hallett* v. *Middleton*, 1 Russ. 243; *Fain* v. *Ayers*, 2 S. & S. 533; and *ante*, p. 248.

Whether within the covenant for further assurance.

Whether the Obligation of Covenants runs with the Land.]—Preliminary to the inquiry, whether the relative situations of the parties to a covenant are such as to make the burden or the benefit of it transmissible to assignees, is the inquiry, whether the subject-matter of the covenant itself is of a nature to fit it for such transmission. "The authorities lay down, 1st, that in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land, or to 'a thing in existence parcel of the demise;' 2ndly, that where it respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assignees by naming them, but will not bind them unless named; and, 3rdly, that where it respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is, will not bind the assignee nor pass to him, even though he is named. These rules appear to have been originally laid down with reference to leases, but authorities are not wanting in which they have been treated as applying equally to cases not involving the relation of landlord and tenant. They are usually laid down as constituting the whole of the settled law on this subject, and appear to apply equally, whether we consider the *burden* or the *benefit* of covenants:" Third Rep. of Real Prop. Com.

Whether the obligation of covenants will run with land.

When Covenants run with Land.

45 (*f*). It is proposed to consider how far these remarks are applicable in the present state of the law.

Obligation of Covenants.

Spencer's Case.

The question whether the obligation of covenants in a lease runs with the land, so as to bind the assignees of the land, was fully considered in *Spencer's Case*, 5 Rep. 16, and 1 Smith, L. C. (8th ed.), p. 68 *et seq.* It was there ruled, by the first resolution, that "when the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being." In the second place, it was resolved that in the case under consideration "if the lessee had covenanted for him *and his assigns* that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee *by express words*. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *warrantia chartæ:* F. N. B. 135 and 9 E. 2; *Garr' de Charters*, 30, 36 E. 3; *Garr'* 1, 4 H. 8; Dyer, 1. But although the covenant be for him and his assigns, yet if the thing to be done be *merely collateral to the land*, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged."

It was also laid down in the seventh paragraph that "the assignee of the assignee should have an action of covenant. So of the executors of the

(*f*) Upon the subject of covenants generally, the observations of the Real Property Commissioners, in their third Report, will well repay perusal.

assignee of the assignee; so of the assignees of the executors or administrators of every assignee, for all are comprised within this word (assignees), for the same right which was in the testator or intestate shall go to his executors or administrators; as if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch, and so shall the heirs of the assignee; the same law of the assignee of the heirs of the feoffee and of every assignee. . . . . For the same right which was in the ancestor shall descend to the heir in such case without express words of the heirs of the assignees."

When Covenants run with Land.

Obligation of Covenants.

The Conveyancing and Law of Property Act, 1881, appears not to have effected any alteration in the law relating to the binding force of covenants so far as regards the assigns of the covenantor; for sect. 58 (1) affects only the devolution of the benefit of covenants (see *ante*, p. 212), and assigns are not mentioned in the 59th section.

Sect. 58 of the Conveyancing and Law of Property Act, 1881.

The question as to the liability of an assignee to perform covenants entered into by the party under whom he claims may arise in three very different cases:—1st, where, at the date of the covenant being made, the covenantor and covenantee stood in the relation of tenant and landlord; 2ndly, where, at the date of the covenant being made, the covenantor and covenantee stood in the relation of assignee and assignor; and 3rdly, where, at the date of the covenant being made, the covenantor and covenantee were strangers in respect of the title to the land when the covenant was made.

Where the obligation runs with the land.

This subject has been fully discussed, so far as relates to the first class of cases, *ante*, Vol. III., tit. LEASES, pp. 228 *et seq.*

The practical distinction between covenants in a lease and covenants in a conveyance of the grantor's whole estate is obvious. Leases are ordinarily qualified with covenants on the part of the lessee and his assigns, and every purchaser of a leasehold estate looks to the original lease as the foundation of his title and the source of information as to

Liability of purchaser's assignee.

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his liabilities (*g*). But a vendor who conveys his estate out and out, on the contrary, does not usually exact any permanent covenant or engagement from the purchaser (*h*), and purchasers do not consider themselves bound to look beyond the immediate conveyance to their own vendors; and great injustice might be inflicted on purchasers if they were held liable on covenants of the existence of which they might not have had even constructive notice.

Covenants entered into by owners of land.

It is proposed in this place to consider, first, how far the burden or obligation of covenants entered into by owners of land runs with the land. Of such covenants some have relation to interests possessed or acquired by the covenantee independently of the covenant, such as a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; others are not connected with any such interests in the land, as a covenant by the owner of a particular close that it shall never be built on, but always remain an open space.

The cases in the old books do not appear to be decisive of the point whether as a matter of law this class of covenants would bind the assigns of the original grantor; and the modern cases seem to negative the position. Even the case of *Morland* v. *Cook*, L. R. 6 Eq. 252, where an opinion was expressed that a covenant to repair a sea-wall, which protected the land behind it from being flooded, was a covenant which would run with the land, appears to have been decided upon the ground that the object of the sea-wall was so apparent, and the necessity for its repair so obvious, as to fix the purchaser with the responsibility of inquiring as to the liability to repair, so that he was, in effect, held to be affected with constructive notice of the

(*g*) Hence arises the doctrine that notice of a lease is notice of its contents.

(*h*) This observation does not apply to covenants of indemnity in assignments of leases, &c., and such covenants might reasonably be held to run with the land; and there appears to be authority for making an exception in their favour at least. See, as to covenants for title, production of deeds, and indemnity in assignments of leases, *ante*, pp. 229, 256, and *post*, p. 350.

covenant; and see also *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, *post*, p. 266.

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The next class of covenants entered into by the owners of land present considerable difficulties in practice, that is to say, covenants entered into by the owners of particular land with the owners of other neighbouring or adjoining land, so as to impose conditions upon the mode of enjoyment of land in favour of persons taking no property in such land. Such covenants are of frequent occurrence in cases where the areas of squares or public walks are to be preserved, or where an uninterrupted view of the sea or of open country is to be secured to the owners of adjoining houses.

Covenants by the owners of land where the covenantee has no interest beyond the covenant.

Covenants of the kind now under discussion are usually of a restrictive character, and bind the covenantor not to do certain things; they are sometimes positive, and impose upon him a duty to be performed, as where a purchaser of building land at a fee-farm rent enters into a covenant to erect buildings upon the land similar to buildings on adjacent land; or where a purchaser enters into a covenant to do some special thing, as to make a pump and reservoir for the supply of certain property: compare *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; and *Cooke* v. *Chilcot*, 3 Ch. D. 694. In the case of a purely restrictive covenant, equitable relief can be readily given; but where the covenant is to execute works requiring a supervision which the Court cannot undertake to provide, there is some difficulty in applying the remedy. In some cases, as in *Cooke* v. *Chilcot*, 3 Ch. D. 694, the Court has given relief by granting an injunction against leaving the work undone. But see this case considered, *infra*, p. 294.

Difficulty of enforcing such covenants.

Brewster v. *Kidgill.*

The older decisions on this subject may be very briefly referred to. In *Brewster* v. *Kitchell, Kitchlin* or *Kidgill* (Salk. 198, 615; Holt, 175, 609; Ld. Raym. 317; 5 Mod. 368; 12 Mod. 166), the owner of a farm granted a rent-charge in fee, and, by a subsequent deed, covenanted with the grantee and her heirs that it should be paid free from taxes. *Holt*, C.J., delivered the judgment

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of the Court, and added the following remarks (12 Mod. 170), "This covenant does not run with the land (Hard. 87). I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted, but that the covenant should run with the rent against the assignee of the land, I see no reason. If this rent was granted to be so paid, it would be another matter, but here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this case against the *terre* tenant but only in equity." But the other three judges thought that this covenant might charge the land, being in the nature of a grant, or, at least, a declaration going along with the grant, showing in what manner the thing granted should be taken. See, however, the remarks of *Wilmot*, C.J., in *Bally* v. *Wells*, Wilm. 349.

Cook v. *Arundel.*

The case in Hard. 87, 1 Eq. Ca. Ab. 26, *Cook* v. *Arundel*, cited by *Holt*, C.J., is not in point. There the owner of land, subject to a fee-farm rent, had granted part of the land to one under whom the plaintiff claimed, and covenanted that those lands should be discharged of the rent; upon which covenant it was held, in equity, that the plaintiff could not have relief against a subsequent purchaser of other part of the lands. It was no more than an ordinary and personal covenant. Even if the defendant had notice of the plaintiff's purchase and of the covenants with him, it is (notwithstanding *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *S. C.*, sub nom. *Cornbury* v. *Middleton*, 1 Ch. Ca. 208, see at p. 212), at least, doubtful whether he could have been held bound to exonerate the plaintiff: see *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, and other cases cited, *infra*, p. 266.

Holmes v. *Buckley.*

In *Holmes* v. *Buckley*, Pre. Ch. 39; 1 Eq. Ca. Ab. 27, one and his wife, being seised in right of the wife of land, granted a watercourse through the land to the grantee, and covenanted for them, their heirs and assigns, to cleanse the same. The watercourse, by mesne assignments, came to the plaintiff and the land to the defendant, who built on and

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much heightened the ground on the watercourse, making it more chargeable and inconvenient to repair; and, as it was alleged and in part proved, the building had much obstructed the watercourse. So, the bill was for establishing the enjoyment of the watercourse, and that the defendant and all claiming under him might, from time to time, cleanse the same. It was objected, that the covenant being personal was not strengthened by a recovery which had been had for that purpose. But the Court was of opinion that this was a covenant which ran with the land, and was made good by the recovery, and that though the plaintiff, and those under whom he claimed, had for forty years cleansed the same at their own charge, yet, since the right was plain upon the deed, and the cleansing made chargeable by the building, it was reasonable that the defendant should do it, and decreed accordingly. The decision here was only that the contract was binding in equity on parties with notice, although the dictum certainly goes the full length of asserting that the burden of the covenant ran with the land, and the benefit of it with the easement. Whether it would now be held that the assignee of the covenantee was bound by it, even though he took with notice, is perhaps doubtful: see *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, and the remarks there made upon the case under consideration. It is also to be observed that it does not appear to have been noticed that the married woman under whom the lands were claimed could not covenant either by the deed or by the recovery. See also *Mayor of Carlisle* v. *Blamire*, 8 East, 486.

Roach v. *Wadham.*

In *Roach* v. *Wadham*, 6 East, 289, real estate was conveyed to C., to such uses as Watts should appoint, and in default of appointment, to him in fee, yielding and paying, and Watts and C. granted to the vendors a yearly fee farm rent: Watts and C. also covenanted to pay the rent. Watts and C. subsequently joined in a conveyance by which Watts exercised his power of appointment in favour of a purchaser; and the original vendors sued the appointee on the covenant. It was decided that the

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conveyance by Watts and C. operated as an appointment overreaching the estate of Watts, and not as a conveyance of that estate; so that Watts was a stranger to the estate taken by the appointee, and consequently his covenants did not run with the estate so as to bind the appointee. The counsel for the appointee (who afterwards became Lord *Tenterden*) confined himself, as did the Court, to the one question whether the appointee took by appointment, it being taken for granted that if he took the estate of Watts, he was bound by the covenants of the latter. The case, in fact, appears to have been decided upon the assumption that this point was too clear for discussion; and it is as strong an authority as anything short of an actual decision can be against the dictum of *Holt*, J., in *Brewster* v. *Kidgill*, *ante*, p. 261.

Barclay v. *Raine.*

In *Barclay* v. *Raine*, 1 S. & S. 449, the question was discussed with regard to a covenant by the owner of land to produce the title-deeds relating to that land, and also to other land belonging to the covenantor; and it appears (see *post*, p. 269) that Sir *J. Leach*, V.-C., was of opinion that the covenant would run with the land. Whether the learned Vice-Chancellor meant that the burden would run, or the benefit, or both, does not appear. But, assuming that he meant that the burden of the covenant would run, there appears to be an obvious distinction between the covenants for title and for production of deeds and other covenants, such as those under consideration. The point is, perhaps, not now of importance: see *ante*, p. 260, n.

Randall v. *Rigby.*

The dictum of *Parke*, B., in *Randall* v. *Rigby*, 4 M. & W. 130, does not appear to affect the question under discussion, as the defendant in that case was the covenantor himself, who also appears not to have been the *terre* tenant. But in the case of the *Duke of Bedford* v. *Trustees of the British Museum*, 2 My. & K. 552, though the point did not arise, Sir *J. Leach*, V.-C., seems to have thought that a restrictive covenant would run with the land: for he said that if the deed then under consideration afforded evidence of an intention that the land should

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be subject to the restriction for ever, there was a clear remedy at law against the act which was being sought to be restrained, and a clear remedy in equity to restrain the commission of the act.

Keppel v. *Bailey.*

Unreasonable burdens not to be imposed.

In *Keppel* v. *Bailey*, 2 My. & K. 517 ; Coop. Ca. *t.* Brougham, 298, there was a covenant by the lessees of certain ironworks to use a particular railroad, and to pay a specified toll. An *ex parte* injunction, obtained to restrain the assignees of the covenantor from using another railroad, was dissolved by Lord *Brougham*, C., after full argument. His lordship pointed out that there was no privity of estate between the lessees of the ironworks and the owners of the road ; that the law will not permit any novel or unreasonable burdens to be imposed upon land ; that there is an essential difference between covenants in leases and those made between parties not standing to one another in the relation of lessor and lessee ; and held that where there is no privity of estate, the covenant is purely collateral, and binds not the assignee. He further expressed an opinion that privity of estate other than the relationship between landlord and tenant, would not be sufficient : see 2 My. & K. pp. 534, 538. This case of *Keppel* v. *Bailey*, 2 My. & K. 517, must now be taken to be overruled so far as concerns any expressions occurring in the judgment which may seem to militate against the decision in *Tulk* v. *Moxhay*, 2 Phil. 774 ; but in other respects it remains an unshaken authority, and establishes that where no privity of estate exists, there the burden of covenants cannot run with the land.

Austerberry v. *Corporation of Oldham.*

It will be seen from the foregoing examination of the earlier cases, that the question under consideration was till recently one upon which it was difficult to reconcile judicial opinions or to advise with any confidence. But in the case of *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, this question was raised and fully considered. In this case it was necessary for the plaintiff to show, not only that he, as the assignee of the original covenantee, was entitled to the benefit of a covenant to repair a road on which he was a frontager, but also that the de-

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fendants, as assignees of the original covenantors, were subject to the burden of it. It was argued, as to this latter point, that the burden of the covenant ran with the land, and reference was made to *Holmes* v. *Buckley*, 1 Eq. Ca. Abr. 27 (see *ante*, p. 263); *Morland* v. *Cook*, L. R. 6 Eq. 252 (see *ante*, p. 260); *Western* v. *Macdermott*, L. R. 1 Eq. 499; 2 Ch. 72; *Cooke* v. *Chilcott*, 3 Ch. D. 694; and to *Milnes* v. *Branch*, 5 M. & S. 411 (see *post*, p. 274). In delivering his judgment upon this point, *Lindley*, L.J., said: "Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty; Does a covenant to repair all this road run with the land—that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount either to a grant of an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind them who acquire it." His Lordship then discussed the cases referred to by counsel, and pointed out that they might be explained as falling within the exception, as being in effect covenants amounting to grants (cf. *Mayor of Carlisle* v. *Blamire*, 8 East, 486); and then proceeded: "I am not aware of any other case which either shows, or appears to show, that a burden such as this can be annexed to land by a mere covenant, such as we have got here; and in the absence of authority, it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all it is a

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mere personal covenant. If the parties had intended to charge this land for ever, into whosesoever hands it came, with the burden of repairing the roads, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and, therefore, it seems to me to show that they did not intend to have a covenant which should run with the land." See also the judgment of *Fry*, L.J., 29 Ch. D. at p. 785. It was also pointed out by *Lindley*, L.J., that the Court of Appeal in *Western* v. *Macdermott*, L. R. 2 Ch. 72, had not sanctioned the notion that even a purely restrictive covenant would run with the land; and it seems to follow that there cannot be a covenant of any kind (except, possibly, covenants for title, and probably the obligation of an acknowledgment of the right to produce deeds, and of an undertaking for safe custody thereof), which, as between vendor and purchaser, will run with the land so as to impose upon the assignee of the covenantor the liability to perform it; for the liability of the grantor under a grant is essentially different from that of a covenantor under a covenant. As regards a purely restrictive covenant, the doctrine of *Tulk* v. *Moxhay*, 2 Phil. 774, binds an assignee with notice to give it effect (*infra*, p. 290); but, as will be seen (*infra*, p. 296), this doctrine does not apply to any covenants except those which are restrictive in the strict sense of the term.

It is also to be observed that the decision in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, is based not upon the presence or absence of the word "assigns," for the covenant to repair was for the trustees, "their heirs and assigns," see *S. C.*, at page 754; but rather upon the nature of the covenant. It would appear that the considerations noticed *ante*, p. 259, as to the distinction between covenants in a lease and covenants in a conveyance of the grantor's whole estate, tend to the same conclusion as that arrived at by the Court of Appeal; and it may

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probably be taken to be settled law that no covenant, *quâ* covenant, can run with land so as to bind the assigns of the covenantor to perform the obligation imposed by it. See also *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562.

Benefit of covenants with the owner of the land and relating to it will run with it.

When the Benefit of Covenants will run with the Land.]—Questions sometimes arise upon the point which is the converse of that just considered, *i.e.*, whether the assignee of land can enforce the performance of covenants entered into with his assignor. The most usual cases of this nature are those relating to covenants for title.

The better opinion seems to be, that the benefit of all covenants relating to the land, and entered into with the owner of any estate in the land, whether upon the conveyance to him and by the party conveying, or by a mere stranger, and after the estate has become vested in the covenantee, will run with that estate. Where the covenant is entered into by the grantor with the grantee at the date of the grant, this is not disputed. Thus, in *Middlemore* v. *Goodale* (Vin. Ab. *Covenant* (K.) 6; Cro. Car. 503; 1 Rol. Abr. 521, K., pl. 6; Sir W. Jones, 406) it was held that the assignee might sue for breach of a covenant for further assurance. And the benefit of the covenant will run with the land, though it relates only to a term of years: *Noke* v. *Awder*, Cro. Eliz. 373, 486. These authorities were followed in *Campbell* v. *Lewis*, 3 B. & Al. 395 (in error, affirming *Lewis* v. *Campbell*, 3 Moo. 35), which was an action by a second assignee of part of the premises comprised in a lease, against the lessee for breach of his covenant for quiet enjoyment, the landlord having entered upon a forfeiture incurred by the defendant. See also *Kingdon* v. *Nottle*, 4 M. & S. 53; *King* v. *Jones*, 5 Taunt. 418; 4 Mau. & S. 188; *Orme* v. *Broughton*, 4 M. & Sc. 417; and see Shep. Touchst. 171; *Sharp* v. *Waterhouse*, 7 E. & B. 816.

Whether covenants with the owner of the

"Expressions found in some books would lead to the opinion, that, in considering this class of covenants with reference to the benefit of them, there is

a distinction between those cases where the covenantor is a party by whom the estate is, or has been, conveyed, and those in which he is a stranger to the estate. We think the authority of Lord *Coke*, on this point (which is express, Co. Litt. 384, b.), sufficient to warrant us in disregarding this distinction." Third Real Prop. Rep., p. 52. See Sugd. Vend. 585 *contrà*.

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land by a stranger will run with the land.

Sir *J. Leach*, M. R., seems to have thought (though whether he was referring to the benefit or to the burden of the covenant, or to both, is not quite clear) that a covenant to produce title-deeds, entered into by a stranger, would run with the land: *Barclay* v. *Raine*, 1 S. & S. 449 (see *ante*, p. 264); or, at least, that such would be the effect if the covenant were by a purchaser with his vendor, who had parted with the deeds, but retained part of the estate. It is clear that, in regard to the land not sold, to which alone the covenant in question relates, the parties are strangers to each other. The doctrine then, of the learned judge would seem to involve the conclusion, that a covenant entered into by a stranger with the owner respecting the land runs with it. If such a general proposition can be maintained, it would show that it is unnecessary that privity of estate should subsist between the covenanting parties. It has been deemed essential by some authors that the covenantor and covenantee should stand in the relation of grantor and grantee of the lands to which the covenants relate; but what privity of estate, it may be asked, subsists between the parties in such a case? As applied to the relation of reversioner and lessee, the term has a clear and intelligible meaning, but has no very obvious application to the case of a grantor who parts with his whole estate, and who ceases to have an interest in, and is, therefore, a stranger to, the land at the instant that it vests in the grantee. In support of the hypothesis in question, much stress was laid on what fell from Lord *Kenyon*, in *Stokes* v. *Russell*, 3 T. R. 402, where his lordship says: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be

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privity of estate between the covenanting parties." But it is to be observed, that the question before the Court in this case, was not whether a covenant entered into by a stranger with a person having an estate in the land, could run with it, but whether a covenant by a lessee with a stranger to the reversion was annexed to that reversion. In that case a mortgagor and a mortgagee had joined in granting a lease, and the lessee's covenants being made with the mortgagor, and not with the mortgagee, the covenants were held to be, as they obviously were, covenants in gross.

The case, therefore (and the dictum must be taken *secundum subjectam materiam*), left wholly untouched the doctrine respecting the annexation to the land of covenants entered into by a stranger with the owner of the land. One of the cases put by Lord *Coke* as an instance of a covenant running with the land, is certainly of this description:—

Lawrence Pakenham's case.

"A., seised of the manor of D., whereof a chappell was parcell, a prior, with the assent of his convent, covenanteth by deed indented with A. and his heires to celebrate divine service in his said chappell weekely, for the lord of the said mannor, and his servants, &c. In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedie by covenant doth runne with the land, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor (*k*). But if the covenant had been with a stranger to celebrate service in the chappell of A. and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the mannor, because the covenantee was not seised of the mannor." Co. Litt. 384, b.

In this case, it is clear, there was no privity of estate (using that term in the sense which, in the cases under consideration, has been given to it) between the prior and the lord of the manor; and

(*k*) 2 H. 4, 6, *Hen. Horne's Case*, 6 H. 4, 1; *Spencer's Case*, 5 Rep. 17, 18; 6 Vin. 392: see Bro. Ab. *Cov.* pl. 15; 2 Bos. & P. 568, n.; Sugd. Vend. 586; *Anon.*, Moore, 179, pl. 318.

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the reason assigned by the very learned commentator for the distinction between the two cases which he puts in opposition, shows that he considered it sufficient that the covenant was with the owner of the land respecting the land. The whole difference is made to consist in the covenantee being, or not being, seised of the manor, without regard to the relative character of the covenantor. We have, therefore, the high authority of Lord *Coke*, uncontradicted by decision, in favour of the doctrine in question; and it may be taken to be without doubt that the Courts would now hold that the benefit of covenants for title, to produce title-deeds, and all other covenants capable in their nature of running with the land, if made with any person having an estate in the land, would be annexed to that estate in the hands of an alienee.

In this connection, the *Case of the Coparceners* may be referred to, in which it was adjudged that where two coparceners made partition of land, and the one made a covenant with the other to acquit her and her heirs of a suit that issued out of the land; the covenantee aliened; in that case the assignee shall have an action of covenant, and yet he was a stranger to the covenant, because the acquittal did run with the land (42 E. 3, b.) Co. Litt. 384, b. As coparceners have not any unity of seisin, this case seems to be an authority in favour of the proposition here contended for (*l*).

In *Raymond* v. *Fitch*, 2 Cr. M. & R. 508; *S. C.*, 5 Tyrwh. 985, Lord *Abinger*, C. B., in delivering the judgment of the Court, upon a case in which it was held that the executor of a lessor, who was owner in fee, might sue the lessee for breach of a covenant not to fell timber trees, which were excepted out of the demise, said that there was no

(*l*) In *Mayor* v. *Steward*, 4 Burr. 2446, in deciding that the covenant by an assignee of a lease to indemnify his assignor (who, being joint tenant with him, had released his interest), was not discharged by the bankruptcy of the latter, the Court said, that this was the bankrupt's own express collateral covenant, not a covenant that runs with the land. But the dictum was entirely extrajudicial.

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doubt but that the covenant in question was purely collateral, and did not run with the land; for the trees being excepted from the demise, the covenant not to fell them was the same as if there had been a covenant not to cut down trees in an adjoining estate of the lessor; and he added that for the breach of such a covenant, after the death of the covenantee, the heir or devisee of the land on which the trees grew could not sue. The remarks of the Chief Baron were directed to a question which was not necessary for the decision of the case, inasmuch as the Court appear to have found that the loss of shade, and so forth, was a sufficient ground on which to base an action by the executor. Nor do the remarks in question appear to be well founded. If the reason of the Chief Baron's opinion was that the covenant by the lessee was that of a stranger (and the learned judge obviously had the fact that the lessee was a stranger to the trees in his mind), then his opinion is contrary to the current of authority. It seems impossible to conceive that he could have considered that the covenant did not sufficiently touch or concern the thing in question, for it went to the full length of the total destruction of the thing to which it was presumably annexed, *i.e.*, the timber. It may, therefore, be doubted whether the dictum is right. It is irreconcilable with the case of *Vyvyan* v. *Arthur*, 1 B. & C. 410, where a lessor in a lease of lands reserved suit to his mill, and then devised the reversion, and it was held that the devisor was entitled to sue upon the reservation: see also *Lawrence Pakenham's Case*, 42 E. 3; Co. Litt. 384, b.; and *Goodman* v. *Boycott*, 2 B. & S. 1.

Covenants, the benefit of which runs with land.

The cases quoted supply instances of covenants the benefit of which will run with land: and it appears that in each case it must be decided whether the nature of the particular covenant is such that it touches or concerns the land so as to run with it in this sense. In the case of *Western* v. *Macdermott*, L. R. 1 Eq. 499; 2 Ch. 72, the question was raised whether a merely restrictive covenant would run with land, so as to give the terre tenant

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the benefit of it. Lord *Romilly*, M.R., held that both the benefit and the burden of the covenant ran with the land; but Lord *Chelmsford*, L.C., said he was relieved from deciding this point, for it was admitted that the defendant bought with notice of the covenant, and he was held bound by it on the equitable ground of notice: cf. *per Cotton*, L.J., in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 777. In *Cooke* v. *Chilcott*, 3 Ch. D. 694, it was held that a covenant by a purchaser of land to erect a pump and pump water on to the adjoining land retained by the vendor ran with the land. The case is now overruled so far as regards the burden of the covenant; but it would seem that as respects the benefit of the covenant, it was rightly decided (see *per Cotton*, L.J., in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. at p. 778): that is to say, that the plaintiff, the assignee of the covenantee, was entitled to enforce the covenant, but that he could not enforce it against the assignee of the covenantor, inasmuch as the burden of the covenant did not run with the land.

When assignees take the benefit of covenants.

The circumstances under which the benefit of a covenant can run with land were discussed in the case of *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750. In that case it was said by *Cotton*, L.J., that "in order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee." In that case the land, as to which the question arose whether the benefit of the covenant ran was land abutting upon a road. One of the covenants was that the whole of the road should be kept as a road for the use of the public, subject to tolls. Notwithstanding a reservation to the predecessor of the plaintiff of a right of way over the road for agricultural purposes, free of tolls, it was held that although the covenantee thought that the user of the road by himself and the owners of adjoining lands as members of the public, would be of benefit to them, the covenant was not one which was made in such a way as to relate to or touch and concern the land of the covenantee. With regard to another

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of the covenants, that to repair, *Lindley,* L.J., pointed out that the covenant was to repair the whole road, and that no distinction was made between the part of the road abutting upon the plaintiff's land; that there was no special reference to the plaintiff's land, or any covenant to do anything upon it. It was therefore decided that the plaintiff could not claim that this covenant ran with the land so as to entitle him to the benefit of it; though it was said that had the covenant been worded so as to show that there had been an intention to grant him some particular benefit in respect of that particular part of his land, it might possibly have been held that the benefit of the covenant did run with this land. *Fry,* L.J., expressed no opinion upon this point. He appears to have thought it doubtful, and preferred to rest his decision upon the other ground (viz., that the burden did not run), which he thought clear.

Whether benefit of covenants will run with incorporeal hereditaments.

Another question which has been a subject of controversy is, whether the benefit of covenants will run with an incorporeal hereditament. In *Bally* v. *Wells,* Wils. 346, it was decided that the obligation of a covenant by a lessee of tithes would bind an assignee, and the Court decided the case on the ground that, having once got rid of the idea of matter, there was no difference, for this purpose, between a corporeal and an incorporeal hereditament. So, in *Brewster* v. *Kidgill,* Holt. 175; 12 Mod. 166, the action was brought by the heir of a grantee of a rent-charge, and *Holt,* J., said, "I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." The case of *Milnes* v. *Branch,* 5 M. & S. 411, has been generally regarded as an authority against the position; but the case does not go quite so far. In that case land had been conveyed by Barnsley and Robinson, to the use, that they might have a rent out of the land, and subject thereto to the use of Branch, the purchaser; and the purchaser covenanted with Barnsley and Robinson, and the heirs of Barnsley, that he would pay the rent, and, within a year, build certain

houses. Barnsley, within the year, demised the rent for a thousand years to the plaintiffs, who brought the present action against Branch for breaches of the covenants to pay the rent and to build. A demurrer was allowed. The above dictum of Lord *Holt* was cited. Lord *Ellenborough*, C.J., said, "I am inclined to think that the language of Lord *Holt* as to the right of the assignee of the rent to have covenant was extrajudicial; and, putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal." *Bayley*, J., said, "I am entirely of the same opinion. The argument of the plaintiff loses sight of the conveyance by which this rent is created. It is incorrect to state it is a rent-charge granted by the owner of the fee; it being a conveyance in fee by Barnsley and Robinson to the defendant to certain uses, one of which is that they shall receive the rent; so that the rent arises out of the estate of the feoffors. It is, therefore, not a grant by the owner of the fee, and the covenant is a covenant in gross."

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This case is exceedingly unsatisfactory, and not the less so because the grounds of decision stated by the two learned judges who delivered their opinions are different. Lord *Ellenborough* seemed to rely on a distinction between land and rent, as if the latter were no more than a personal chattel. Though these observations of his lordship may seem to imply a doubt whether the grantee of the rent could in any case maintain an action for it, yet the decision can hardly be taken as an authority to this extent. A rent is an incorporeal hereditament, and there seems to be no reason why a covenant should not run with it, as well as with any other species of real estate. The affirmative, indeed, has been expressly decided as to tithes, on the construction of the stat. 32 Hen. 8, c. 34, on the ground that there was no distinction between land and incorporeal

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hereditaments in regard to the annexation of covenants: *Bally* v. *Wells*, 3 Wils. 25; Wilm. 341: and it was assumed in the case of *The Earl of Portmore* v. *Bunn*, 1 B. & C. 694, that a covenant would run with any incorporeal hereditament. So also, in the case of *The Earl of Egremont* v. *Keane*, 2 Jones, 307, it was held that where a rent was reserved upon a demise of tolls of a market, the burden of the covenant to pay the rent ran with the tenement and bound the assignee: and, in *Martyn* v. *Williams*, 1 H. & N. 817, the Court of Exchequer drew attention to the fact that stat. 32 Hen. 8, c. 34, extends in express terms to incorporeal hereditaments, and is not restricted to lands. Compare also *Norval* v. *Pascoe*, 34 L. J. Ch. 83. The case of *Martyn* v. *Williams*, 1 H. & N. 817, was that of a grant of an incorporeal hereditament in shape of a licence to dig minerals; and with this case may be compared *Hooper* v. *Clark*, L. R. 2 Q. B. 200, where a covenant was held to run with a grant of a demise for a term of a right to shoot game. A contrary doctrine would render covenants for title in grants of advowsons, tithes, and other incorporeal hereditaments, merely covenants in gross.

Bayley, J., founding his judgment in the case of *Milnes* v. *Branch*, *supra*, on the circumstance that the rent was created before the estate reached the covenantor, seemed to admit that the result would have been different if the covenantor, being seised, had himself granted the rent. But it is difficult to perceive the ground of such a distinction. Every analogy points the other way. It seems to be clear that, in the case of land, the assignee may sue on the covenant of a stranger; and it is settled that, under the stat. of Hen. 8, if the lessor bargain and sell the reversion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within the statute. So, if the lessor grant the reversion to the use of A. and his heirs, it is sufficient assurance within the statute, because he comes in by the act and limitation of the party, albeit he is in the *post*, and the words of the statute be *to or by;* and they

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be assignees to him, although they be not by him: Co. Litt. 215 a. See *Isherwood* v. *Oldknow*, 3 M. & S. 382, that a remainderman is an assignee of the reversion on a lease made by the tenant for life under a power. Had the distinction been taken as a ground for holding that the *obligation* of the covenant by Branch did not run with the land, it would have been more intelligible. Certainly, if the subject would admit of such refined consideration, it might, in one sense, be difficult to frame any covenant by a stranger to a rent-charge, and to the land out of which it issued, so as to bring it within the definition of a covenant touching or concerning the hereditament in question. A covenant to pay the rent would not concern it, because the payment, if made, would not be that rent; and a covenant for assurance of the rent would seem to be equally irrelevant. But it is clear that an assignee of a reversion may sue the lessee in covenant after he has assigned, and the lessee has accepted the assignee: *Matures* v. *Westwood*, Cro. Eliz. 617; *Brett* v. *Cumberland*, Cro. Jac. 521; *Ashurst* v. *Mingay*, Show. 133. And yet, in this case, any thing that the lessee could be obliged to perform under the covenant would be collateral to the land quite as much as in the case of the rent-charge. That this is by the statute is immaterial to the illustration, because it is settled that the statute does not extend to collateral covenants: *Webb* v. *Russell*, 3 T. R. 395. See further as to authority of the decision in *Milnes* v. *Branch*, the cases of *Randall* v. *Rigby*, 4 M. & W. 135; *Butler* v. *Anker*, 12 Ir. Ch. Rep. 104; and *Haywood* v. *Brunswick Permanent Building Society*, 8 Q. B. D. 403. It is settled that covenants will run with incorporeal hereditaments, such as tithes and the like; and there seems no reason in principle for considering that a rent stands upon a different footing from other hereditaments of a like nature. See, however, the opening sentences of the judgment of *Brett*, L.J., in *Haywood* v. *Brunswick Permanent Building Society*, 8 Q. B. D. at p. 407. Covenants will not run with personalty: see *Spencer's Case*, 5 Rep. 16 a; *Gaston* v. *Gregory*, 3 B. & S. 90; *Mears* v. *London and South-Western*

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Rail. Co., 11 C. B. (N. S.) 85; *Tancred* v. *Allgood*, 4 H. & N. 438; *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502.

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Practical suggestion as to mode of granting rent-charge.

In the last edition of this work (see Vol. IX., p. 361) a suggestion was made, arising from the cases of *Milnes* v. *Branch* and *Roach* v. *Wadham*, that where a fee-farm rent is intended to be granted, which is to be accompanied by a covenant for payment, the grant should be simply of a rent-charge; and that in this, as in every case where it is intended that the burden of a covenant should run with the land, the owner of the inheritance of the land, who enters into the covenant, should, on alienating the land, if he has both a power and an estate, convey by virtue of his ownership and not execute his power. It was further suggested that an effectual mode of insuring this would be to make him appoint to himself in fee, previously to his granting the rent. As, however, it seems to be settled that the burden of a covenant cannot be made to run with land, or to bind the assigns of the covenantor, except on the ground of notice, such expedients would now apparently be of little efficacy.

When covenants pass to the cestui que use.

It appears from the passage cited from Co. Litt. p. 215 a; and see 3 Leon. 225; Moore, 97, that an assignee of a reversion claiming under a bargain and sale under the statute, or under a grant to his use, is such an assignee as may have the benefit of covenants under the stat. of Hen. 8. It is also clear that generally the benefit of covenants entered into with a releasee to uses, will pass to the *cestui que use*, and that an assignee through the Statute of Uses is in the same position as an assignee by a common-law assurance: *Bascawin* v. *Cook*, 1 Mod. 223; *S. C.* nom. *Cook* v. *Herle*, 2 Mod. 138, a case of a rent-charge (*m*).

Provisions of the Statute of Uses as to rents.

(*m*) Rent-charges are subject, with other hereditaments, to the general provisions of the Statute of Uses, so that, if an existing rent-charge is granted to A., to the use of B., or if the owner of freehold land grants a rent-charge at common law to A., to the use of B., in either case the use is executed in B. But there is also a particular provision in the Statute of Uses (sects. 4, 5) for the execution of rents not in existence, or not created by a grant at common law, but having their inception only in use, to the

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It is clear, however, as a general rule, that a *cestui que use* is entitled to all benefits and advantages inherent to the estate, and, among them, to covenants running with the land: see 1 Sand. Us. 120, 5th ed.; Sugd. Gilb. Us. 184; *Lee* v. *Arnold*, 4 Leon. 27; *S. C.* nom. *Appowel* v. *Monnoux*, Moore, 97 (a case of a reversion); *Roll* v. *Osborne*, Moore, 859; *Smith* v. *Tyndal*, 2 Salk. 685.

With whom covenants for title should be made.

It follows that the correct mode of framing covenants for title is, to make them with the releasee or grantee to uses, and then they enure, incidentally, with the land to the *cestui que use*. The habendum, therefore, or the premises if there be no habendum (which, let it be remembered, is not an *essential* part of a conveyance), will always show with whom such covenants ought to be entered into, and the proper words of limitation to be used; though the introduction of inaccurate words of limitation, as executors or administrators instead of heirs, &c., would not prevent the covenants from taking due effect: *Lougher* v. *Williams*, 2 Lev. 92; *Sacheverell* v. *Froggatt*, 2 Saund. 367; 2 Lev. 13; *Anon.* Dy. 45. The conveyancer will do well to grasp clearly the proper mode of framing covenants under the old law. The provisions of sects. 58 and 59 of the Conveyancing and Law of Property Act, 1881 (*ante*, p. 259), render it unnecessary in most cases to insert the words of limitation which were formerly usual, and sometimes necessary; but cases may very well arise to which the enactments last referred to are not entirely applicable. In ordinary cases the covenants implied by virtue of the 7th section of the Act would, it is presumed, be taken to have been made with the grantee to uses, as he would appear to be the person "to whom the conveyance is made" within the terms of that section.

Covenants once annexed,

If the covenants, from having been made with the

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effect that where persons are seised of lands to the use that some other person shall have a rent out of the same lands for a life or years, or other special time, the *cestui que use* shall be seised of the rent, and have the same remedies, as if it had been granted to him. See Vol. I., p. 650, sub tit. ANNUITIES.

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continue to run with the land.

grantee to uses, have become annexed to the land, they will continue so annexed through all the subsequent modifications of ownership which the land may undergo; and in this point of view it would seem to be quite immaterial whether the *cestui que use* (assuming him to be the donee of a power of appointment under the ordinary limitations for preventing dower in favour of a purchaser) alien the land by exercising his power or by granting his estate; for the mere shifting of the use (which is simply the result produced by an appointment) cannot have the effect of severing from the land the covenants which have been once annexed to, or have actually begun to run with, it in the hands of the first or immediate *cestui que use*. This seems to be the inevitable consequence of admitting the covenants to have passed with the land to the *cestui que use* at all, and is not contradicted by the case of *Roach* v. *Wadham*, 6 East, 289; for there the covenant, which was held not to bind the covenantor's appointee, was entered into by the *cestui que use*, and not by the releasee to uses.

As to covenants in deeds of appointment.

If this view of the case be correct, it seems to show, in extenuation of the evils said to belong to an appointment as a mode of conveyance in regard to its effect upon covenants for title, &c., that (*n*) the adoption of this species of assurance does not deprive the appointee of the benefit of the covenants contained in the antecedent conveyance; the true doctrine being, it is conceived, that covenants entered into with the grantee to uses run with the land for the benefit of all the *cestuis que use*, whose estates

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As to naming appointees or assigns as covenantees.

(*n*) The better opinion, it has been seen, is that covenants with the owner of the land by a stranger (in which situation an appointor stands) are not covenants in gross, and, consequently, that the vendor's covenants, in a conveyance by appointment in fee, run with the land in the same manner as in a conveyance at common law. But in a conveyance by appointment, as in a conveyance by release, the covenants will only run with the estate of the covenantee, and, if he takes but a particular estate, and an estate in remainder is limited to another person, the covenants will not run with the latter estate, unless the remainderman is expressly named in the covenant.

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Effect where covenants are entered into with *cestui que use.*

are derived out of the momentary seisin of such grantee, whether such *cestuis que use* be or be not parties to the conveyance, and whether they claim immediately under it or by virtue of an appointment made under a power contained in such conveyance. If, however, the covenants in question were made, not with the grantee to uses, but with the *cestui que use*, although it should seem they would run with the land for the benefit of the representatives and assigns of the covenantee, *i.e.*, any person who claims as the successor or alienee of his estate; yet, in such a case, an appointee of such *cestui que use* (who does not stand in this position, but is in under the deed creating the power), cannot, it is apprehended, sue upon the covenants contained in such deed, since the appointee claims, not as the alienee of the covenantee, but as a substituted *cestui que use*. Hence, it is obvious that the appointee could no more claim the benefit of the covenants entered into with the donee of the power, than could *cestui que use* A. claim the benefit of covenants entered into with *cestui que use* B., whose estate was limited by the same conveyance.

Enough has been said to show the propriety of the recommendation that, where the grantee to uses and the purchaser are different persons, covenants which are intended to run with the land should be made with the former. Where the grantee to uses and *cestui que use* are different persons, the covenants implied by the Conveyancing and Law of Property Act, 1881, will apparently enure through the grantee to uses for the benefit of the *cestuis que use*, so that the latter can enforce the covenants accordingly.

Covenants Running with the Land; Estoppel.]—As the covenants for title are of more value in proportion as the conveyance itself is less operative, it becomes important to ascertain how the doctrine of estoppel will operate in those cases in which the conveyance passes no estate, or no such estate as the purchaser's assignee may be enabled to rely on, when the necessity of resorting to the covenants is first discovered. Where the supposed conveyance did not

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pass the legal estate, there can be no assignee at law. It has been laid down, that the benefit of a covenant will not run with an estate to which the covenantee is only entitled by estoppel. Assuming for the present that this is so, it may be asked, whether, if (under the doctrine in *Doe* v. *Oliver*, 5 M. & Ry. 202, that the estate, when it reaches the party estopped, feeds the estoppel), the covenantee eventually obtains an estate, the covenants will then attach. Of course the obligation of a real covenant will run with an estoppel, that is to say, will bind all persons claiming the estate through or under the party estopped.

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The doctrine of estoppel, if carried strictly out, would seem to require that the grantee should not, in an action on the indenture, be permitted to allege that it did not operate according to its purport. But if this were so, an action could scarcely be brought in any case upon the covenants for title in a conveyance; for if the deed purported to confer a good title, and therefore did not disclose any defect, the grantee would be estopped from alleging a defect, and, though evicted, must necessarily admit that the eviction was unlawful, and therefore not within the covenants; and the case of *Noke* v. *Awder*, cited *infra*, seems to have been founded too much on this notion. The proper way of regarding the matter appears to be, that statements by deed are estoppels only *quoad* the purpose for which they are made, and so may estop for one purpose and not for another (*Gaunt* v. *Wainman*, 3 Scott, 413); therefore the recital of the grantor's title shall estop him and his assigns from denying that he then could convey, because it is made with a view to conveyance, and for the same reason it shall estop the grantee, so long as he is not ousted, from asserting a want of title in his grantor as an excuse for not performing his part of the compact. But *quoad* the covenants for title, the recital of title is obviously immaterial, or rather may be said to be contingently inconsistent with them, and, so far only as may be necessary for their operating, to be set loose by them.

Upon the question, whether the benefit of cove-

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nants will run with an estate by estoppel, there is very little authority. In *Noke* v. *Awder*, Cro. Eliz. 373, 436; Moore, 419, all the Court held it clear that this action of covenant lieth not, and it never lies upon the assignment of an estate by estoppel. But they postponed judgment, and, adhering to their opinion as to the estoppel, finally decided for the defendant on the ground that they would not intend a lease by estoppel, and so the entry was unlawful, and no breach. Moore says that the point as to estoppel was so adjudged in 35 Eliz.: *Armiter* v. *Parkes*; see *Campbell* v. *Lewis*, 3 B. & Al. at p. 396.

Noke v. *Awder.*

Covenant held not to run with title by estoppel.

In *Whitton* v. *Peacock* (2 Bing. N. C. 411; 2 Scott, 630; 3 My. & K. 325) it was held by the Court of Common Pleas that a surrenderee of copyholds claiming under a lessor who, having no title had granted leases and subsequently obtained the legal estate, could not sue on the covenants contained in the original leases. No reasons were given by the Court. But in *Gouldsworth* v. *Knights*, 11 M. & W. 337, the Court of Exchequer undertook to explain the case of *Whitton* v. *Peacock*. The case of *Gouldsworth* v. *Knights* was a case of trespass for an unlawful distress. The plaintiff, who had held over after the determination of a lease for years from a body of trustees whose estate in the lands had been before distress levied divested by Act of Parliament and vested in another body, had paid rent to the old trustees more than once, and this was evidence of a new taking under them as tenant from year to year, and such new taking precluded the plaintiff from contesting the title of the assignees of the lessors who had authorised the distraint, who therefore as against him had a good title by estoppel. It was contended that, as the old trustees had no title at all, nothing would pass by their grant, and reference was made to two cases as establishing this proposition. *Parke*, B., said: "Neither of these cases is applicable. The first was that of *Whitton* v. *Peacock* (2 Bing. N. C. 411), in which the substance of the marginal note is, that, if a person who has an equitable estate only demises by deed, and then conveys the reversion,

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the assignee cannot maintain an action on the covenants in the lease. This is very inaccurate. The point decided was this:—A copyholder devised his estate to another without surrendering to the use of his will. The devisee of the devisee who, of course, had no estate at all, either legal or equitable, demised part of the copyhold by deed, and the lessee covenanted to pay rent and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessee of the part before demised, took a covenant from him to perform the covenants contained in that lease. The lessor afterwards surrendered the copyhold to another, and the question was, whether the surrenderee could maintain an action on these covenants against the assignee of the lease. The Court held that no such action would lie. No reasons are given, but there is clearly a satisfactory one, for the reversion by estoppel in the first lease was not a copyhold transferable by surrender and admittance. The other case referred to was *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307. In that case, one who had only an equity of redemption granted a mortgage to the lessor of the plaintiffs, who brought an ejectment, and the defendants, the tenants, were permitted to show that there was a prior mortgage, and that the first mortgagee had given notice to them to pay him. That was equivalent to showing eviction by title paramount."

Remarks on *Whitton* v. *Peacock*.

Estoppel by matter in pais.

This explanation of *Whitton* v. *Peacock* does not make the difference between that case and *Goulds-worth* v. *Knights* very clear. When a stranger to the legal estate puts a person in possession as his tenant, the latter, by accepting possession, is estopped from denying that the party from whom he took it was entitled to confer it; and, by the tenant's conduct, this estoppel may be continued indefinitely. So, except in case of mistake or fraud (see *Jew* v. *Wood*, Cr. & Ph. 194), he is estopped from denying the title of a party whom he has accepted as assignee of the reversion: *Morton* v. *Woods*, L. R. 3 Q. B.

658; L. R. 4 Q. B. 293. But this estoppel is not prospective; in no case where there is not a deed is the tenant estopped from showing that, subsequently to his last acknowledgment of A.'s title, that has been superseded by the title of B., whether paramount or derivative is immaterial: see, however, *Agar* v. *Young*, 1 C. & M. 78. A lease or grant by indenture operates differently. There each party to the deed, and all persons subsequently claiming in interest under him, are estopped in any action or proceeding founded on the deed from denying any material statement in it: 2 Stark. 52; 3 Scott, 413. Nor, except by way of counter estoppel, can an estoppel in one deed be removed or explained by another. But it is laid down, that where any interest passes by the deed, neither party is estopped from showing the inability of the grantor to grant all that he pretended: 2 Wms. Saund. 418 n. The ground of this distinction, if it is to be understood in all the generality of the forms in which it is announced, has never been explained (*o*). Apart from authority, it should seem to be as inconsistent with a deed, purporting to be a conveyance of the fee by A., to say that A. has only a life estate, as to say that A. had no estate. In the case of a lease there is usually an express or implied absolute warranty of or covenant for quiet enjoyment, and therefore in such cases it has been held (though the reasoning

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No estoppel where any interest passes.

(*o*) The early authorities do not support the general doctrine for which they are cited. Thus, in *Gilman* or *Holman* v. *Hoare*, 1 Salk. 275; 3 Id, 152, it was held to be no defence to an action of debt for rent on a demise by indenture for forty years, that, a year before, the plaintiff had made a demise to another for forty years. The position in 1 Inst. 47 b, that, if tenant *pur autre vie* lease for years by indenture, and afterwards purchase the reversion, the lease ends with the life of *cestui que vie*, was cited; but *Holt* said, the reason of that is because tenant for life has a freehold, which is a greater estate, and the lease will need no estoppel if the life endure; but here the lease must necessarily be void for thirty-nine years, unless made good by estoppel; and that a lease for years may operate in part by estoppel, and in part by passing a real interest, is plain from concurrent leases: see *Blake* v. *Foster*, 8 T. R. 487; *Neave* v. *Moss*, 8 Moo. 389; *Anon.*, Vent, 358: *Doe* v. *Seaton*, 2 Cr. M. & R. 728.

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will not bear examination), that a plea of eviction by title paramount is not inconsistent with the estoppel: see *Holman* or *Gilman* v. *Hoare*, Carth. 248; 3 Salk. 152; *Johnson* v. *Jones*, 9 A. & E. 809; *Boodle* v. *Campbell*, 8 Jur. 475. Whatever may be the principle, it is clear that the covenantee himself, suing on any of the covenants for title, is not estopped from showing, if not a mere defect of title, yet a lawful eviction of himself by one claiming a title inconsistent with the purport of the indenture: see *Severn* v. *Clarke*, 1 Leon. 122. In *Pargeter* v. *Harris*, 7 Q. B. 708, where the fact that the title of the lessor was only equitable appeared upon the face of the deed, it was held that the lessor could sue upon the covenant but that his assignee could not, the covenant being held to be a covenant in gross. But to return to the judgment in *Gouldsworth* v. *Knights*. The point which the Court was ready to decide in that case, had it been necessary, was, that a tenant who is estopped from disputing his lessor's title is estopped from disputing the title of his lessor's assignee; and for this there is some direct authority: *Doe* d. *Biddle* v. *Abrahams*, 1 Stark. 305; see *Rennie* v. *Robinson*, 1 Bing. 147; 7 Moo. 539; *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531, *et vide infra*. This appears to have been the precise point in *Whitton* v. *Peacock*. The question there was, not whether in fact the lessor had such a reversion as would pass by surrender, but whether the lessee and those claiming under him were not estopped from denying that he had such an interest. The only conclusion consistent with the certificate of the Court appears to be that (contrary to the opinion expressed by the learned Judge in equity who sent the case) they were not. The opinion expressed in *Gouldsworth* v. *Knights* was affirmed in *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 H. & N. 135. In that case the want of title did not appear upon the lease, but the lessor was held to be estopped from showing his lessor's want of title. Where the lessor acquired a title subsequently to the lease, the covenants will run as if the lease had been good *ab initio*: *Webb* v. *Austin*, 8 Scott, N. R. 419; *Sturgeon* v. *Wingfield*, 15 M. &

Whether assignee may take advantage of estoppel.

A. 224. The principle of these decisions seems to have been extended also to cases where the want of title appears upon the lease or pleadings of the lessor's assignee: *Morton* v. *Woods*, L. R. 3 Q. B. 658; L. R. 4 Q. B. 293; *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 547. Thus it seems probable that *Pargeter* v. *Harris*, 7 Q. B. 708, would not now be decided as it was.

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Estoppel.

In *Palmer* v. *Ekins*, 2 Stra. 817; 2 Lord Raym. 1550, a lessee in an action by the assignee of the reversion, was not allowed to deny that his lessor had title at the time of the lease, and the Court said that, though the plaintiff was an assignee, he might take advantage of the estoppel, for it runs with the land. This decision (which is of considerable authority) seems to establish not only that the estoppel *binds* the land in the hands of the parties claiming under the party estopped, but also that the *benefit* of an estoppel may to some extent run with the land. In *Carvick* v. *Blagrave*, 4 Moo. 303, however, in covenant for rent, the declaration alleged that the lessor was possessed for the residue of a term of twenty-two years, and that he by indenture demised to the defendant, and afterwards assigned the reversion to the plaintiff. The defendant pleaded in bar, that the lessor was not at the time of making the said underlease possessed of the said lease, &c.; the Court held the lessee entitled to plead in bar, as the allegation as to the title was not made by the lessor but by the assignee, and the lessee was entitled to know if there was privity between him and the assignee: cf. *Weld* v. *Baxter*, 11 Exch. 816; 1 H. & N. 568. The decision in *Carvick* v. *Blagrave* has been much questioned: see 2 Wms. Saund. 207 d, 418 c; see also the observations on this case in 1 Sm. L. C. at pp. 114, *et seq.*

Palmer v. *Ekins.*

Carvick v. *Blagrave.*

The assignee of the lessee, being in possession and not relying on a better title *aliunde*, is, of course, bound by the same estoppel as the lessee himself: *Doe* d. *Bullen* v. *Mills*, 2 A. & E. 17; *Doe* d. *Manton* v. *Austin*, 2 Moo. & Sc. 107; *Cooper* v. *Blandy*, 1 Bing. N. C. 45; *Taylor* v. *Wadham*, 2 Taun. 276.

Estoppel binds assignee.

It appears from a consideration of the cases that the exact effect of the estoppel evoked by a lease as

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against the lessee, is a matter to be decided by examination of facts and the form which the lease or the pleadings take in each instance.

Estoppel.

The purchaser in entitled to enforce his covenant for further assurance, although he has a title by estoppel: *Bensley* v. *Burdon*, 8 L. J. Ch. 85.

Notice.

Restrictive Covenants—Doctrine of Tulk v. *Moxhay.*] —It was observed by the Real Property Commissioners in their Third Report, that the proper remedies in the case of restrictive covenants can be best applied by the Courts exercising an equitable jurisdiction; and that in the discussion and decision of such cases, the question of notice must be taken into account. Since the Judicature Act, 1873, sects. 24 and 25, law and equity are to be administered concurrently; and where there is any conflict or variance between the rules of equity and the rules of common law, the rules of equity are to prevail. It follows that in all actions on restrictive covenants, in whatever division of the High Court they may be brought, the question of notice will be material.

Whatman v. *Gibson.*

The equitable jurisdiction of the Courts appears to have been first applied to the case of a covenant or agreement attempted to be enforced against an assignee with notice, in the case of *Whatman* v. *Gibson*, 9 Sim. 196. A covenant had been entered into not to build beyond a fixed frontage line; and the assignee of the covenantor who had taken with notice of the covenant, had transgressed the limit. It was insisted on his behalf at the trial, that the covenant was against public policy, and that it could not run with land, as it was purely collateral, and the plaintiff had no reversion in the land. It was said by Sir *L. Shadwell*, V.-C., that the only question was whether, there being an agreement, all persons who came in as devisees or assignees under those who took with notice of the deed containing the covenant, were not bound by it. He saw no reason why such an agreement should not be binding on the parties so coming in with notice; and he so decided. The Vice-Chancellor at the same time declined to state a case for the opinion of a court of

law, on the ground that there was a probability that at law the covenant would be exclusively considered. From this case it appears that the doctrine which is now known as the doctrine in *Tulk* v. *Moxhay*, is not one which applies specially to covenants, but is merely the application of the doctrine of notice to covenants in the same way as it would be applied to agreements generally.

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In the following year (1839) the case of *Schreiber* v. *Creed*, 10 Sim. 9, came before the same judge. In that case the owner of a large estate sold portions of it to various purchasers, retaining a portion, which was to be laid out in pleasure gardens and grounds. The purchasers entered into a series of covenants restrictive of their powers of building, and binding them to build substantially in accordance with a plan ; and the vendor on his part covenanted to maintain the grounds when laid out. The vendor had relaxed in favour of one purchaser the restrictions which, under the covenants, he had imposed upon the others. It was held that the plan was not intended to be strictly binding upon the vendor, but that its details might be varied by him, and, with his sanction, by a purchaser, and that the plaintiff (who was an assignee of one of the original purchasers) was not entitled to avail himself of the covenant either against the vendor or against another purchaser. Referring to the covenant by the vendor with the purchasers of sites, that he would lay out walks, lawns, and conveniences of that kind, and to a covenant for repairing and keeping them in good order and condition, Sir *L. Shadwell* said : " It is quite plain that a mode of dealing with the land which would go directly to destroy those lawns, promenades, &c., never could be permitted, because any one of the persons, parties to the deed, might have a remedy, as well by action of covenant as by bill in equity, to restrain the vendor, his heirs or assigns, from any general dealing with the land which would have the effect of destroying those promenades and plantations." It is to be remarked that though in all probability an assign of any of the purchasers would have been able, at all events in

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equity, to restrain a user of the retained portion in consistent with the covenants entered into by him, the covenants for repair and maintenance would not be enforceable against an assign of the vendor, as it would not run with the land at law, and would not be within the doctrine of *Tulk* v. *Moxhay*, see *infra*; see also the cases of *Haywood* v. *Brunswick Permanent Building Society*, 8 Q. B. D. 403; *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562; and *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750.

Mann v. *Stephens.*

In the case of *Mann* v. *Stephens*, 15 Sim. 377, a vendor who was seised in fee of a house and a piece of land, sold the house and covenanted with the purchaser that no building should for ever thereafter be built upon the piece of land which the vendor retained. The piece of land was afterwards sold, and the purchaser had notice of the covenant, and it was held, on equitable grounds, that he was bound thereby.

Tulk v. *Moxhay.*

The doctrine which had been applied in the previous cases was fully considered in the case of *Tulk* v. *Moxhay*, 2 Phil. 774, which has been accepted as the leading case upon this subject. In that case the owner of houses in Leicester Square, London, and of the Square itself, sold the Square, with the equestrian statue therein, and the purchaser covenanted to lay out the Square as a garden for the benefit of the inhabitants of the Square. The Square became vested in the defendant, who took with notice of the covenant, but expressed his intention of building upon the open space notwithstanding. In deciding the case, Lord *Cottenham*, C., said, "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I have never heard questioned. It is said that the covenant being one which does not run with the land, the Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner in-

consistent with the contract entered into by his vendor, and with notice of which he purchased." He further said, "that the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, the Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." He held, accordingly, that the purchaser was bound by the covenant.

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The principle thus formulated has since been frequently applied. *Patching* v. *Dubbins*, Kay, 1, was a case where a covenant to leave land without building upon it was enforced against a purchaser taking with notice. *Coles* v. *Sims*, Kay, 56; 5 De G. M. & G. 1, was a case of an attempt to violate a covenant as to frontage and otherwise in a general plan of laying out a building estate. *Child* v. *Douglas*, Kay, 560, was a case of a covenant not to erect any building within a specified number of feet of an intended street. With these cases may be compared *Western* v. *Macdermott*, L. R. 1 Eq. 499; 2 Ch. 72; *Peek* v. *Matthews*, L. R. 3 Eq. 515; *McLean* v. *McKay*, L. R. 5 P. C. 327; *German* v. *Chapman*, 7 Ch. D. 271; *Lord Manners* v. *Johnson*, 1 Ch. D. 673; *London, Chatham & Dover Rail. Co.* v. *Bull*, 47 L. T. 413; *Chitty* v. *Bray*, 48 L. T. 860. In *Parker* v. *Whyte*, 1 H. & M. 167, a covenant not to carry on a particular trade was held to be binding upon an assignee with notice; and covenants of this nature have also been enforced in the cases of *Dennett* v. *Atherton*, 7 Q. B. 316; *Mitchell* v. *Steward*, L. R. 1 Eq. 541; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Luker* v. *Dennis*, 7 Ch. D. 227; *Nicoll* v. *Fenning*, 19 Ch. D. 258; *Kelsey* v. *Dodd*, 52 L. J., Ch. 34. So where the covenant was that the beer to be sold in a public-house should be procured from the plaintiff, the defendant was restrained from purchasing elsewhere: *Catt* v. *Tourle*, L. R. 4 Ch. 654.

The doctrine in *Tulk* v. *Moxhay* followed in subsequent cases.

In *Coles* v. *Sims*, 5 De G. M. & G. 1, it was at-

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tempted to be argued that a covenant that a plot of land should not be built upon, was contrary to public policy, but without success. Indeed a similar agreement had already been enforced against the Commissioners of Woods and Forests, in *Rankin* v. *Huskisson*, 4 Sim. 23. See also *Squire* v. *Campbell*, 1 My. & Cr. 459; *McLean* v. *McKay*, L. R. 5 P. C. 327; and *Catt* v. *Tourle*, L. R. 4 Ch. 654.

Restrictive Covenants—Perpetuity.]—It has often been questioned whether unlimited restrictive covenants are not void as transgressing the limits of perpetuity. The question was raised and discussed in the case of *Keppel* v. *Bailey*, 2 My. & K. 517, and in pronouncing judgment in that case *Brougham*, L.C., said:—"I do not at all doubt that the enjoyment of property may be tied up, and an illegal perpetuity created by annexing conditions to grants, or by executing covenants whereby whoever happens to be in possession shall be restrained from using that which is the subject of the grant or covenant in all but a certain prescribed way; provided always that the restraint so constituted is not reserved in favour of some other party who may release it at his pleasure; and therefore all such conditions and covenants are void if they go beyond the period allowed by law. But, if the party for whom the condition is made, or the party covenanting, has the entire power of dealing with his interest in the subject-matter, it is an obvious mistake to treat this as an instance of perpetuity, or of any tendency to a perpetuity. Thus, admitting that the owners of an estate could no more be restrained perpetually from cultivating it by supplies derived from any but one market, or from selling its produce at any but that market, than they could be restrained from selling the estate; and admitting that the one would be as much a breach of the rule against perpetuity as the other, it would be no such violation, nor would it in way defraud that rule, if the owner of the estate were restrained from buying and selling at any market save that belonging to a certain party, entitled by grant or covenant

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to the privilege, and which he might, at his pleasure, vary or extinguish. Upon other grounds such a restraint may be objectionable and void in law as well as bad in policy, but certainly not upon the doctrine of perpetuity, any more than a right of way or other easement which the owners of an estate may enjoy over the close of another, or a rent issuing out of an estate, and which may nearly absorb its profits. The easement and the rent are the property in question, and they are free."

This passage would appear to point to the possibility of all persons in whom the various rights and interests in property were vested, joining and conveying it, as the true criterion of the question whether a disposition of property is void for transgressing the rule or not. This, however, seems not to be a correct view of the law in this respect. A definition of a perpetuity which has recently been quoted with approval by more than one judge, is as follows:—"A perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested under that limitation" (*p*). It seems, therefore, that a covenant, even though it may be capable of being released, may be void as tending to create a perpetuity: and when this is the case, it appears that the covenant will not be enforced by the Court under the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774, and that upon the ground that the covenant is void: *London and South Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562. In that case, however, the covenant was not

(*p*) Lewis on Perpetuities, p. 164. Quoted in *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. at pp. 575, 581, and *Dunn* v. *Flood*, 25 Ch. D. at p. 633.

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actually restrictive (*q*), but was a covenant to do a distinct act, which in effect created an interest, of an equitable nature, in the land affected thereby. Where a covenant is purely restrictive it appears to be regarded as not within the rule: see *Keppell* v. *Bailey*, 2 My. & K. 517; *Catt* v. *Tourle*, L. R. 4 Ch. 654.

Principle of *Tulk* v. *Moxhay* applies only to restrictive covenants properly so called.

Extent of doctrine in Tulk v. *Moxhay.*]—It must be remembered that the equitable doctrine of notice does not apply to all cases of covenant. The expressions used in the case of *Tulk* v. *Moxhay*, would seem to imply that covenants to use land in a particular way, in the sense of performing particular things upon the land, might be enforced against a purchaser with notice. The strongest case in this direction seems to be that of *Cooke* v. *Chilcott*, 3 Ch. D. 694. In that case the purchaser covenanted that he would carry out certain works upon his land with a view to supply the land of the vendor with water; and it was held that this was either a covenant which would run with the land, or a covenant by notice of which a sub-purchaser would be bound. It was also held that, though the Court would not grant a mandatory injunction to compel the construction of works which it could not superintend, yet the same result might be obtained by the granting an injunction to restrain the person liable to perform the covenant from permitting the covenant to remain unperformed. This case has been subsequently under the notice of the Courts in more than one instance, and must now be regarded as overruled on this point: see the judgment of *Brett*, L.J., in *Haywood* v. *Brunswick Permanent Building Society*, 8 Q. B. D. 403, at p. 408. In that case land had been granted to a purchaser in fee in consideration of a rent-charge, and of a covenant to build and repair buildings, it was held that the assignee of the grantee of the land was not liable to the

(*q*) This case in effect overrules the *dictum* in the case of *Gilbertson* v. *Richards*, 4 H. & N. 277, 297; and the decision in *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421.

assignee of the grantee of the rent-charge, on the covenant to repair: he was not liable at law because the covenant is within *Milnes* v. *Branch*, 5 M. & S. 411, and does not run with the rent, even though a rent in fee; nor at equity, for the doctrine of *Tulk* v. *Moxhay*, does not apply to cases where the covenant can only be enforced by making the covenantor "put his hand into his pocket;" and in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, where a piece of land for a road was granted to trustees for a joint stock company who were to make a road, and the trustees in the conveyance covenanted with the grantor, his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and keep it in repair, it was held that the assignee of the adjoining lands of the grantor could not enforce the covenant as against the assignees of the trustees, though the assignees of both the grantor and the trustees took with notice of the covenant. It was laid down in this case also, that the doctrine of *Tulk* v. *Moxhay*, 2 Phil. 774, applies only to restrictive stipulations, and is not to be extended so as to bind in equity a purchaser who takes with notice of a covenant to expend money on repairs or otherwise, which does not run with the land at law: and it was also said by *Lindley* and *Fry*, L.JJ., that the burden of a covenant which does not involve a grant (as to which see *infra*, p. 296), never runs with the land except as between landlord and tenant, and that, so far as regards this part of the judgment in *Cooke* v. *Chilcott*, 3 Ch. D. 694, that case must be considered as overruled. It follows, therefore, that *Cooke* v. *Chilcott* cannot be relied on in either branch of the decision: for the covenant did not run with the land, it being not a case of landlord and tenant; and the covenant was one which required the expenditure of money, and therefore one which, according to the cases of *Haywood* v. *Brunswick Permanent Building Society* and *Austerberry* v. *Corporation of Oldham*, could not bind the purchaser in equity, even though he took with notice. This limitation of the principle of *Tulk* v. *Moxhay*, was carried even further by the

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How far principle of *Tulk* v. *Moxhay* extends.

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Court of Appeal in the case of *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562, in which it was laid down that that principle does not apply to covenants to do acts relating to the land. So also in *Andrew* v. *Aitkin*, 22 Ch. D. 218, it was held that the assignee of a grantee of land subject to a rent-charge and to a covenant to erect buildings of a certain value was not bound affirmatively by the covenant, though he might be called upon to allow the buildings to be erected upon the land in conformity with the covenant.

Result of the cases.

It appears, therefore, that such covenants as are strictly restrictive, though they do not run with the land (*ante*, p. 288), may be enforced against the assignee of the covenantor, on the equitable ground of notice: but that covenants to perform any act with regard to land, as a rule, will not bind the assignee, unless they run with the land at law: and it has been seen that such covenants run with the land only when the relation of landlord and tenant exists at the date of the covenant between the covenantee and the covenantor.

Covenants amounting to a grant.

There is, however, a further class of cases to be considered, in which the Courts at first sight appear to have gone to the length of decreeing purchasers with notice of covenants to expend money upon land to comply with these covenants. Upon a closer examination it would seem clear that the ground on which the Courts have enforced the performance of such covenants, has rather been that the covenants have in fact partaken largely of the nature of grants; and that they were in effect, not covenants binding the assignees as running with the land, or on the ground of notice, but grants to which the assignees could be compelled to give effect. In the old case of *Brewster* v. *Kidgill*, 12 Mod. 166 (*r*), the owner of a manor granted a rent-charge in fee, and on the deed was endorsed a memorandum declaring it to

(*r*) This case is also reported elsewhere: see *ante*, p. 261; but the report in 12 Mod. 166, seems to be most intelligible: see a fuller discussion of the case in the notes to *Spencer's Case*, 1 Smith, L. C. 75.

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be the true intent and meaning of the deed that the grantee and his heirs should for ever thereafter be paid the said rent-charge without any deduction or abatement of taxes, charge, or payment out of, for, or concerning the said rent, or the said manor or land charged therewith. The Court differed as to the construction to be put upon this memorandum; but they agreed in their view, first, that if the memorandum was to be taken as a part of the grant, it ran with the land, and secondly, that if it was a covenant to pay without deduction, it did not so run. Lord *Holt* took the latter view; the other two judges the former. In *Holmes* v. *Buckley*, 1 Eq. Ca. Abr. 27, there was a grant to the plaintiff's predecessor in title of a watercourse over land held by the defendant, with a covenant by the grantor of the watercourse to cleanse it. The defendant seems practically to have interfered with the watercourse by his building operations; and the plaintiff sought to compel him to fulfil his covenant to cleanse. With reference to the question of the devolution of the burden of the covenant, it has been pointed out that the plaintiff clearly had a right to relief of some sort in order to prevent the defendant from interrupting his easement: and also that the report of the case is too brief and obscure to afford safe ground for inference as to the precise grounds of decision. As regards the right of the assignee of the plaintiff to enforce the covenant, it has been suggested that the decision may be supported either on the ground that the watercourse was intended to supply the plaintiff's land, and that the covenant to cleanse ran with the land for the benefit of which the watercourse existed: *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. at p. 777; or on the ground that the covenant to cleanse was in fact part of the grant of the watercourse, so as to give the grantor a right which he could enforce without reference to the question whether the covenant would or would not run with the land: compare *Rowbowtham* v. *Wilson*, 8 H. L. C. 362; *Aspden* v. *Seddon*, 1 Ex. D. 496. In the case of *Morland* v. *Cook*, L. R. 6 Eq. 252, there had been a partition of lands protected

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by a sea-wall from the inroads of the sea; and the several grantees had covenanted to contribute rateably to the cost of repairing the wall. The defendant had no actual notice of the covenant; but it was held that the situation of the land was in itself sufficient to put him upon inquiry. Lord *Romilly*, M.R., in deciding the case, said that this was a covenant which ran with the land; but it was remarked by *Lindley*, L.J., in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D., at p. 782, that "there was that which amounted to the creation of a rent-charge for the repair of the sea-wall." It seems, therefore, that, except as between landlord and tenant, the burden of a covenant cannot run with the land, unless it amounts to the grant of an estate or interest in the land, and that the equitable doctrine of notice cannot be employed to compel the assignee of a covenantor to incur outlay or to do anything of an active character.

What notice is sufficient to bind assignee.

According to *Tulk* v. *Moxhay*, 2 Phil. 774, in order to render the covenant binding on an assignee, it is necessary that such assignee should take with notice. Of course, no question can arise where the notice is actual and personal in the assignee. But it has also been held that constructive notice is sufficient for this purpose, and that an assignee is bound who is put upon inquiry, and might have discovered the fact of the existence of the covenant if he had taken the trouble to make proper inquiries. In such cases the assignee suffers for his own default. Thus, a purchaser who derives his title under deeds containing notice of the covenant, will be held to be affected with notice: *London, Chatham and Dover Rail. Co.* v. *Bull*, 47 L. T. 413; and this point has been carried further still, for, in *Coles* v. *Sims*, 5 De G. M. & G. 1, it was held that an assignee, claiming by means of deeds, one of which referred to the deed containing the restrictive clause, though not to the clause itself, was held to be bound by the clause. So a lessee is bound by covenants of this nature by which his lessor is bound, for he is to be presumed to be aware of his lessor's title and all that affects it:

Parkyn v. *White*, 1 H. & M. 167; *Eastwood* v. *Lever*, 13 W. R. 195; *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Dennett* v. *Atherton*, L. R. 7 Q. B. 316. This liability of the lessee is not removed by sect. 2, sub-sect. 1 of the Vendor and Purchaser Act, 1874, but a lessee is now in the same position as if, before that Act, he had, by stipulation, precluded himself from demanding the production of the lessor's title: *Patman* v. *Harland*, 17 Ch. D. 353. See also *Clements* v. *Welles*, L. R. 1 Eq. 200; *Wilson* v. *Hart*, L. R. 1 Ch. 463; *Sumner* v. *Schofield*, 43 L. T. 763; *Thornewall* v. *Johnson*, 50 L. J. Ch. 641; see also Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 3.

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It is also possible that a purchaser may be put upon inquiry in other ways than by means of title-deeds. Thus, in *Morland* v. *Cook*, L. R. 6 Eq. 252, it was held that the purchaser of land which was obviously protected from the sea by a sea-wall, was by that fact put upon inquiry sufficiently to fix him with notice of a covenant to contribute to the repair of the sea-wall. It may, however, perhaps be doubted how far this point was necessary to support the decision in this particular case: see *supra*, p. 297. So, where a purchaser buys land, which in his vendor's hands is subject to a fee farm rent, he is bound to inquire into the provisions of the superior grant: see *Bank of Ireland* v. *Brookfield Linen Co.*, 15 L. R. Ir. 37, and *Hyde* v. *Warden*, 3 Ex. D. 72.

Constructive notice.

The doctrine of constructive notice is not, however, to be pushed further than is consistent with the ordinary rules of prudence and the ordinary conduct of business (*s*). Thus, in *Parkyn* v. *White*, 1 H. & M. 167, it is suggested that if a lessee makes inquiries properly, and then learns nothing which will put him upon further investigation, he will not be bound; and, in *Carter* v. *Williams*, L. R. 9 Eq. 678, it was held that where an assignee had no

(*s*) A purchaser or mortgagee who buys or takes a security without investigation of title, is affected with notice of all that he would have discovered upon the usual investigation, though not of such matters as he would not have ascertained without going behind the documents of title themselves: *Earl of Gainsborough* v. *Watcombe Terra Cotta Clay Co.*, 54 L. J., Ch. 991.

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notice, and would have learnt nothing of the covenant from his assignor, nor even if he had seen the conveyance to his assignor, he was not bound. In that case the restrictive covenant was not contained in the purchase-deed but in a separate instrument, to which the purchase-deed appears not to have referred. It seems, therefore, that where restrictive covenants are imposed upon a purchaser, it will always be prudent either to embody the covenant in his conveyance or to take care that the conveyance refers clearly and with precision to the deed in which the covenants are contained.

Intention of parties.

In *Child* v. *Douglas,* Kay, 560, *Wood,* V.-C., considered the mode in which restrictive covenants operated in cases where a number of purchasers, buying plots on the same estate, enter into covenants either with the vendor or with one another. He suggested that the case was analogous to that of a conveyance to uses where the covenants with the grantee to uses enure for the benefit of the beneficiaries. This, however, appears not to be now regarded as the true view of the matter. The question was discussed in *Keates* v. *Lyon,* L. R. 4 Ch. 218. In that case a vendor sold part of an estate to a purchaser, who entered into restrictive covenants; the vendor then sold other parts to subsequent purchasers, who appear to have had no notice of the first purchaser's covenants; finally, the vendor bought back from the first purchaser the land which had been sold to him. On a subsequent sale by the vendor of this part of the estate, it was contended that the benefit of the covenants entered into by the first purchaser enured to the benefit of the subsequent purchasers, and that the vendor could not sell except subject to the burden of these covenants. It was held that the benefit of the covenants did not enure as was contended, and that the vendor was entitled to sell, discharged from the covenants. The decision appears to turn upon the fact that the subsequent purchasers seem to have had no notice of the covenants, and that there was no intention on their part, or contract between them and their vendor, that they should take the benefit of the covenants. The devolution

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of the benefits of the covenants therefore depends not upon any quality inherent in the covenants themselves but upon the bargain made between the parties who are concerned. In the case of *Harrison* v. *Good*, L. R. 11 Eq. 338, the converse conclusion was arrived at; there the original purchaser covenanted not to do or suffer anything which would be a nuisance to the adjoining property of the vendor. Upon subsequent sales in plots by the purchaser the sub-purchasers entered into covenants in similar terms. It was held that these covenants operated to protect not only the adjoining land of the original vendor but also the different plots of the sub-purchasers, and that it was part of the arrangement that the sub-purchasers should have that benefit, and that accordingly they were each of them entitled to enforce the covenants. See also *Eastwood* v. *Lever*, 13 W. R. 195. This point is well brought out by the two cases of *McLean* v. *McKay*, L. R. 5 P. C. 327, and *Renals* v. *Cowlishaw*, 9 Ch. D. 125; *S. C.*, 11 Ch. D. 866. In the latter of these cases the owner of a residential estate sold a part of it to the defendant's predecessors in title, who entered into restrictive covenants; and subsequently the part of the estate which had been retained was sold to the predecessors in title of the plaintiffs. The plaintiffs, the assignees of the covenantees, endeavoured to enforce the covenants as against the defendants, the assignees of the covenantors; but, as it appeared that there was, as a fact, no intention on the part of the parties to the conveyance to the predecessors of the plaintiffs that they should have the benefit of the restrictive covenants, it was held that they had no title to enforce them. In *McLean* v. *McKay*, a vendor, on the sale of a part of an estate, covenanted with the purchaser that a particular plot of land should be retained unsold, and that it should remain open and unbuilt upon for the benefit of the two parts of the estate. Here the intention being obviously that the benefit and burden of the covenant should devolve upon the successive holders of the two parts of the estate, it was held that it would do so, and that the persons in whom the estate of the purchaser

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was vested might enforce the covenants at any time against the persons in whom the estate of the vendor might happen to be vested. See also *Heslop* v. *Leckie*, 6 App. Ca. 560.

Restrictive Covenants—Doctrine in Tulk v. *Moxhay.*

The intention of the parties in the cases cited appears to have been discoverable from the facts of the case—as from the history of the negotiation or from the documents. In the larger number of cases the data from which the intention has to be inferred appears to be the nature of the original contract, which may or may not be such as to show that it was intended that the burden and benefit of it should continue to exist, and the assent of the particular purchaser to that arrangement, which is inferred from his taking the land notwithstanding that he has notice of the covenant in question. See as to conditions of sale indicating such intention, *Nottingham Patent Brick and Tile Co.* v. *Butler*, 26 Q. B. D. 778.

Who may sue for breach of restrictive covenants relating to land.

The right to enforce a restrictive covenant upon the equitable ground of notice (which stands to the obligation to perform such a covenant upon the same ground in the same relation as the title to the benefit of a covenant running with land to the obligation to fulfil a covenant running with land) devolves upon every assignee of the covenantee who takes with notice.

The question sometimes arises, in connection with cases where the restrictive covenants affect equally plots parcelled out from a larger estate, who may bring an action upon them. There are two principal modes of entering into systems of covenants such as these: either each purchaser enters into the covenants with the vendor, or each purchaser covenants with the other purchasers. In the first case the vendor appears to be regarded as a trustee of the covenants for the benefit of the purchasers severally: *Eastwood* v. *Lever*, 13 W. R. 195; *Harrison* v. *Good*, L. R. 11 Eq. 338. In cases of this kind, where the action is being brought by a purchaser against another, the vendor or original covenantor is not a necessary or proper party to the action, if he has parted with all his interest in the property and is not in any way in fault: *Clements* v. *Welles*, L. R. 1

Eq. 200 ; and this is so even where the conveyance to the defendant purchaser has not been executed : *Bowes* v. *Law*, L. R. 9 Eq. 636, in which case the plaintiff was decreed to pay the costs of the vendor, who had been made a party. Nor are the other purchasers necessary parties : *Western* v. *Macdermott*, L. R. 2 Ch. 72.

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On the other hand, any purchaser or assignee who is entitled to the benefit of the covenants may bring an action to enforce them : *Child* v. *Douglas*, Kay 560 ; *Western* v. *Macdermott*, L. R. 1 Eq. 499 ; 2 Ch. 72 ; *McLean* v. *McKay*, L. R. 5 P. C. 327 ; *Lord Manners* v. *Johnson*, 1 Ch. D. 673 ; *Richards* v. *Revitt*, 7 Ch. D. 224 ; *Nicoll* v. *Fenning*, 19 Ch. D. 258 ; *Martin* v. *Spicer*, 34 Ch. D. 1. Even though the assign be only a lessee of one of the contracting parties, he is entitled to sue to restrain a breach : *Taite* v. *Gosling*, 11 Ch. D. 273. And the vendor himself, or his assign, may sue : *Lord Manners* v. *Johnson*, 1 Ch. D. 673.

Right to sue lost by waiver.

A person entitled to sue upon the covenants may lose his right to relief by his conduct, whether he be the original covenantee, or one of a number of purchaser-covenantees. Thus, where the covenants related to the mode of building upon an estate, and the covenantee had released one of the covenantors, and allowed him to build in such a way as to destroy the advantages which the covenants were calculated and intended to secure, it was held that all the covenantors were released : *Roper* v. *Williams*, T. & R. 18. In the case of *Peck* v. *Matthews*, L. R. 3 Eq. 515, the restrictive covenants were entered into by the purchasers with one another, as well as by the purchasers with the vendor ; the vendor was held to have debarred himself from enforcing the covenants upon one purchaser by having permitted, without interference, material breaches of the covenants by other purchasers. It was also held that the fact that there were covenants by the purchasers with one another as well as the covenants with the vendor, made no difference ; and, further, that the vendor was equally barred of his remedy, though the purchaser in question had bought his plot, and had executed the deed of covenant after the

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breaches by the other purchasers had been committed. In these cases the covenant seems to be taken as waived by the covenantee.

Right to sue lost by acquiescence.

The covenantee may also lose his rights by acquiescence in the particular breach complained of: *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552. The amount of acquiescence which is requisite to have this effect will depend upon the circumstances of each case. Where a building estate had been laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors and with the purchasers of the other lots not to build a shop on his land or to use his house as a shop, or to carry on any trade therein, a purchaser who used his house as a private dwelling-house was held to have barred himself by acquiescence, as it appeared that the breach of which he complained had been a patent and continuous breach for three years before action brought, and one which was known to him: *Sayers* v. *Collyer*, 24 Ch. D. 180; 28 Ch. D. 103. On the other hand, in a similar case, a delay of five months, coupled with non-interference with a similar breach on another part of the same estate, was held not sufficient to disentitle the plaintiff: *Mitchell* v. *Steward*, L. R. 1 Eq. 541; cf. *Coles* v. *Sims*, 5 De G. M. & G. 1; *Kelsey* v. *Dodd*, 52 L. J. Ch. 34.

The doctrine of acquiescence is not, however, to be carried so far as to hold that a man who has permitted an infringement of a covenant is bound to permit another: *per Turner*, L. J., in *Lloyd* v. *London, Chatham, and Dover Rail. Co.*, 2 De G. J. & S. 578. But acquiescence in the violation of a covenant to a certain extent has been held a sufficient objection to the granting of an interlocutory injunction against a greater violation of it: *Child* v. *Douglas*, 5 De G. M. & G. 739. There is, of course, a material difference in this respect between an application for an interlocutory injunction and the actual hearing of the case: see *Patching* v. *Dubbins*, Kay, 1. The rule as to acquiescence barring the right to remedy appears to apply only to cases in which the result of the acquiescence, or of the waiver, has been to make practically unattainable the very objects, for the

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attainment of which the covenants were entered into. So in *German* v. *Chapman*, 7 Ch. D. 271, where the purchasers of plots on an estate covenanted with the vendor not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, it was held that he was not thereby compelled to permit a breach of the covenant in respect of another house. The magnitude of the breaches in which the covenantee has acquiesced must also be taken into consideration: *Kemp* v. *Sober*, 1 Sim. N. R. 517; *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552; *Roper* v. *Williams*, T. & R. 18; *Mitchell* v. *Steward*, L. R. 1 Eq. 541; *Richards* v. *Revitt*, 7 Ch. D. 224. Nor is a purchaser of one part of an estate barred of his remedy, when breaches on another part of the estate have been permitted by the trustees of the deed of covenant on which he relied: *Jackson* v. *Winnifrith*, 47 L. T. 243. Nor will a covenantor be barred even when he has himself committed breaches of the covenant, if such breaches are not material: *Western* v. *Macdermott*, L. R. 2 Ch. 72. It is not necessary that the covenant should state upon the face of it what its object is; that may be gathered from its nature, and any action calculated to defeat the object so gathered will be prevented: *Lord Manners* v. *Johnson*, 1 Ch. D. 673.

What damage will support action.

Relief may possibly be refused on the ground of the smallness of the damage: see *Lloyd* v. *London, Chatham, and Dover Rail. Co.*, 2 De G. J. & S. 580; but it appears doubtful how far this is to be carried. When there is an agreement or covenant between two parties, the Court will restrain a breach of the covenant, without enquiring whether the breach will result in damage of a substantial character: see *Dickenson* v. *Grand Junction Canal Co.*, 15 Beav. 260, a case of an agreement as to user of rights of water: *Tipping* v. *Eckersley*, 2 K. & J. 264; *Lord Manners* v. *Johnson*, 1 Ch. D. 673. The same rule applies where the defendant is an assignee of land with notice of a covenant, and not the original covenantor, and in such cases the covenantee suing on breach of covenant

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is not bound to prove substantial damage : *Richards* v. *Revitt*, 7 Ch. D. 224. Relief was refused in *Johnstone* v. *Hall*, 2 K. & J. 420, on the ground that the plaintiff was a reversioner, and the damage to his interest was trivial and remote, as no special damage was proved.

What will amount to breach of covenant.

A covenant in a lease of cellars under a chapel that they shall be used "as for wine cellars only, and not for interment or burial," has been held to be broken by their use for storage and sale of beer and spirits : *Bird* v. *Lake*, 1 H. & M. 338. The sale of beer under a licence not to be drunk on the premises is not a breach of a covenant not to use a building "as a public-house for the sale of beer, wine, malt liquors, or spirit :" *Pease* v. *Coats*, L. R. 2 Eq. 688 ; *London and North-Western Rail. Co.* v. *Garnett*, L. R. 9 Eq. 26. Compare, however, *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359, and *Nicoll* v. *Fenning*, 19 Ch. D. 258, where the covenant prohibited the use of the premises as a beershop. In *Feilden* v. *Slater*, L. R. 7 Eq. 523, it was held that a covenant not to use the premises "for the sale of spirituous liquor" did not extend to prevent the sale of wine in bottle, but only of spirits in bottle. It has, however, been held that the sale by a grocer, in the course of his trade, of wine and spirits in bottles is not a breach of a covenant that the premises should not be used as "a site for any hotel, tavern, publichouse, or beerhouse ;" and that "the trade or calling of an hotel or tavern-keeper, publican, or beershop-keeper," should not be "used, exercised, or carried on at or upon" the same : *Jones* v. *Bone*, L. R. 9 Eq. 674. A covenant that the covenantor will not do or suffer to be done on the premises, or any part thereof, anything which shall be a nuisance to the vendor or his tenants, is not broken by permitting the erection upon the land of a national school. In these cases the term nuisance must be taken strictly in its legal sense, and in that sense a national school is not a nuisance : *Harrison* v. *Good*, L. R. 11 Eq. 338. Where the covenant was that no buildings should be erected on a particular piece of land except dwelling-houses of a specified

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value, and the covenantor built a wall around the piece of land 8 feet 6 inches high, but in one part 11 feet high, to support a vinery, it was held that the higher part of the wall alone infringed the covenant: *Bowes* v. *Law*, L. R. 9 Eq. 636. A covenant not to erect any building beyond a line of frontage, is broken by the erection of houses with bay windows projecting beyond the line by three feet: *Lord Manners* v. *Johnson*, 1 Ch. D. 673. An hospital where poor patients made payments according to their means, is within a covenant prohibiting the carrying on upon the premises of "any trade, business, or dealing whatsoever, or anything of the nature thereof:" *Bramwell* v. *Lacy*, 10 Ch. D. 691. So also a charitable institution for the education of daughters of missionaries is covered by a covenant that no house on the estate was to be used "otherwise than as and for a private residence only, and not for any purpose of trade:" *German* v. *Chapman*, 7 Ch. D. 271. It appears from a consideration of these cases, that restrictive covenants are usually construed strictly against the covenantor.

It may be noted that *lex non cogit ad impossibilia;* and that therefore where a railway company, under its compulsory powers, took a close which was subject to a covenant not to build, or suffer any messuage to be built thereon, and built a station upon it, it was held that the covenantor was discharged from his covenant by the Act of Parliament, which compelled him to assign to the railway company, and so deprived him of his power to perform the covenant: nor did it make a difference whether the railway company was compelled to build its station upon that close, or only empowered to do so: *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180.

Non-execution of deed by covenantee immaterial.

Actions on Covenants.]—It is not essential, in order to give the covenantee a right of action against the covenantor, that the latter should have executed the deed containing the covenant, provided that in other respects the deed has been adopted by him: see *Archard* v. *Coulsting*, 6 M. & Gr. 75; *Willson* v. *Leonnard*, 3 Bea. 373; *Done*

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v. *South-Eastern Rail. Co.*, 9 Ha. 489: *Bowes* v. *Law*, L. R. 9 Eq. 636. But where in a grant which was not executed by the grantee there was a covenant by the grantee to render a royalty for minerals dug in the land and carried away for sale, it was held that the Court would not, after a long period had elapsed during which the royalty was not paid, presume that a counterpart of the grant had been executed by the grantee, and that neither he nor his representatives were liable under the covenant: *Witham* v. *Vane*, 44 L. T. 718. It may be presumed that the same rule would apply to implied as well as to express covenants.

It was formerly necessary, in the case of an indenture, that a person should have been named as a party to the deed in order to entitle him to take any benefit under it. Accordingly a covenant could not be entered into by a deed with a stranger to the deed: see *Gilby* v. *Copley*, 3 Lev. 138, and cases there cited; Co. Litt. 231 a; *Southampton* v. *Brown*, 6 B. & C. 718. The rule was otherwise as regards a deed poll: see 2 Rob. Abr. 22 F. pl. 1; *Scudamore* v. *Vanderstene*, 2 Inst. 673. But by the Act for the Amendment of the Law of Real Property, 8 & 9 Vict. c. 106, s. 5, it was enacted that under an indenture executed after the 1st October, 1845, the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture. What may be deemed to be a covenant "respecting" any tenements or hereditaments within this enactment, is a question for the solution of which a principle does not seem easily found.

In an action upon the covenant for title or for right to convey, the breach might be assigned in as general terms as the covenant, so that no eviction is necessary to give rise to the right of action: *Bradshaw's Case*, 9 Rep. 60 b; *Salman* v. *Bradshaw* (*S. C.*), Cro. Jac. 304; *Muscot* v. *Ballet*, Cro. Jac. 369; *Lancashire* v. *Glover*, 2 Show. 460; *Nash* v. *Aston*, Skin. 42; 2 Wms. Saund. 181 a. Consequently, the Statute of Limitations commences to run against the covenantee from the execution of

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the conveyance. But where the covenant is for quiet enjoyment, the right to sue first arises when the covenantor is evicted or disturbed in his possession: *Wotton* v. *Hele*, 2 Wms. Saund. 177, 180 *c.*, n.; *Brookes* v. *Humphreys*, 6 Scott, 756. Upon such covenants the Statute of Limitations does not run but from the time of the breach, and then only in respect of that breach; so that if the covenantor is disturbed and recovers possession, and is afterwards disturbed again under a claim within the covenant, a new right of action accrues. If the covenant against incumbrances is in the usual form, that the purchaser shall enjoy free from incumbrances, there is no breach until the incumbrance is brought upon him: *Vane* v. *Lord Barnard*, Gilb. Eq. R. 6; *Ireland* v. *Micham*, 2 Keen. 207; but if it is that the estate is free from incumbrances, as in the common form of a trustee's covenant, then, if there are incumbrances, the covenant is broken at the moment of making it: *Hamington* v. *Rydear*, 1 Leon. 92. But the case is otherwise with regard to the covenant for further assurance; which covenant, it will be observed, being generally to make further assurance *on request*, cannot be broken until request is made, and every new refusal upon request will be a new breach. This remark applies also to the statutory covenant for further assurance.

Whether purchaser can recover improved value.

If the purchaser has made improvements, he must expressly state the special damages, and it is very doubtful whether, as a general rule, he is entitled even in such case to recover them: *Lewis* v. *Campbell*, 3 Moo. 35; *S. C.*, 3 B. & Al. 392.

Measure of damages.

The amount of damages recoverable seems to depend, to a certain extent, on the nature of the covenant which is broken. The covenants for seisin and right to convey seem to apply only to the property in the state in which it existed at the date of the conveyance, while the covenant for quiet enjoyment is in its language such as to contemplate the future; so that it would seem reasonable that where the covenant for quiet enjoyment is broken, the damages may be made to include the cost of improvements. In special cases, as where land is

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bought for building purposes, it seems right that the cost of any buildings actually built upon the land in pursuance of the expressed intention should be taken into account in assessing damages: *Hopkinson* v. *Bunny*, 6 Jur. (N. S.) 187; *S. C.*, 27 Beav. 563; *Duckworth* v. *Ewart*, 10 Jur. (N. S.) 214. In ordinary cases there may be a distinction in this respect between mere improvements of the land itself and buildings of a costly nature erected upon it: see *Lewis* v. *Campbell*, 3 Moo. 35, at pp. 52, 54, and 57.

Under the covenant for quiet enjoyment the actual value of the land is recoverable: *Jenkins* v. *Jones*, 9 Q. B. D. 128; where the covenantee was held to be entitled to recover from his vendor the full value, though he had, only a short time previously, purchased the land at very much less than that amount.

But where land included in a lease was held to be subject to rights of way the creation of which amounted to a breach of the lessee's covenant for quiet enjoyment, it was held that the measure of damages was not the permanent injury to the land, but only the damage actually sustained at the commencement of the action: *Child* v. *Stenning*, 11 Ch. D. 82.

The measure of damages appears to be the difference between what the purchaser has, and what he ought to have. So that if the purchaser finds that he has copyholds or leaseholds instead of freeholds, the measure of damages is the difference between the values of the two tenures: *Gray* v. *Briscoe*, Noy, 142; *Warr* v. *Bickerton*, 3 De G. & Sm. 751. So where a lessee took a reversionary lease from a tenant for life who had power only to grant leases in possession, and he subsequently obtained from the reversioners a lease at an increased rent, it was held that he was entitled to recover from the estate of the tenant for life the difference between the value of the reversionary lease and that granted to him by the reversioners: *Lock* v. *Furze*, L. R. 1 C. P. 441; see *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249; but these cases must be

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carefully distinguished from those in which it has been attempted to recover from a vendor who is unable, from defect of title, to carry out his contract, damages for the failure of such contract: *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Hopkins* v. *Grazebrook*, 6 B. & C. 31; *Likes* v. *Wild*. 4 B. & S. 421; and also *Bain* v. *Fothergill*, L. R. 7 H. L. 158; where note the remarks of Lord *Cairns*, C., as to the difference between the title to real estate and to personal chattels, with reference to this question.

As to the right of an evicted purchaser to recover mesne profits, see *King* v. *Jones*, 5 Taun. 418; and as to the right to recover interest on charges which he has been compelled to satisfy, see *Anderton* v. *Arrowsmith*, 2 Per. & D. 408.

Costs.

Where the purchaser compromised an action brought against him by a party having a better title, it was held that he might, in an action against the vendor on his covenant for title, recover the whole sum so paid and his costs as between solicitor and client in the compromised suit, although he had given no notice of that suit to the defendant: *Smith* v. *Compton*, 3 B. & Ad. 407; *Rolph* v. *Crouch*, L. R. 3 Ex. 44. For the purpose of giving notice is, not to give a ground of action, but, if a demand be made and after notice the party bound to indemnify refuse to defend the action, he is estopped from saying that the claim was not lawful, or was improvidently compromised: per *Buller*, J.; *Duffield* v. *Scott*, 3 T. R. 374. But it would appear to be proper for a person so situated to give notice to the vendor or lessor, or other person liable upon the covenants: *Smith* v. *Compton*, 3 B. & Ad. 408; *Lewis* v. *Peake*, 7 Taun. 153; *Smith* v. *Hewitt*, 6 Exch. 730; *Gillett* v. *Ripon*, 1 M. & Mal. 406; *Short* v. *Kalloway*, 11 A. & E. 28.

Bankruptcy no bar to action on covenant broken.

Formerly there could be no proof in bankruptcy upon a breach of covenant for which damages only can be recovered, even though the performance of the covenant was secured by a penalty as distinguished from liquidated damages, because the penalty was liable to be reduced to the amount of the actual damage, and therefore the bankrupt's certificate was no bar to an action upon a breach of a covenant for title com-

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mitted before the bankruptcy: *Hammond* v. *Toulmin*, 7 T. R. 612; *Ex parte Maclean*, 2 M. D. & De G. 564; see *Mills* v. *Auriol*, 1 H. Bl. 432. But it seems that damages arising from a breach of covenant even though unliquidated, may be proved in bankruptcy under the present Act (46 & 47 Vict. c. 52), which enacts:—

> Sect. 37. "(1.) Debts in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy."

By sub-sect. 3 of the same section it is provided that, save as aforesaid, all debts and liabilities are to be provable in bankruptcy. And see the case of *Re Sneezum, Ex parte Davis*, 3 Ch. D. 463.

Relief in equity on covenants for title.

Where the title failed altogether, and the claim had to be enforced against the covenantor's assets in equity, it was held that an issue must be directed to try the amount of the damages, unless the parties consented to refer it to the Master: *Wade* v. *Paget*, 1 Br. C. C. 368. But so far as it is in the vendor's power to remove any defect, the covenant for further assurance entitles the purchaser to specific relief; and this right is somewhat similar in effect to an estoppel, binding the estate itself in the hands of the party bound by the covenant, though he has acquired it subsequently by purchase for valuable consideration: see *Vane* v. *Lord Barnard*, Gilb. Eq. Rep. 6; *Noel* v. *Bewley*, 3 Sim. 109; *Smith* v. *Baker*, 1 Y. & C. C. C. 223; and *Averall* v. *Wade*, Ll. & G. 260.

By whom actions on covenants for title should be brought.

When covenants for title run with the land, actions for the breach of them should be brought, and releases of such covenants or such actions should be made, by the *real* representatives of deceased covenantees in whom the land is vested, and not by the personal representatives, although the cause of action may have originally accrued in the lifetime of the covenantee, provided the land be still affected by the breach: *Kingdon* v. *Nottle*, 1 M. & S. 355; 4 M. & S. 53; *King* v. *Jones*, 1 Marsh. 107; 5 Taun. 418; *Jones* v. *King*, 5 M. & S. 188; *Vyvyan* v. *Arthur*, 1 B. & C. 410. See as to continuing breaches of

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covenants, *Doe* d. *Ambler* v. *Woodbridge*, 9 B. & C. 376; 4 M. & Ry. 302; *Vivian* v. *Campion*, Holt, 178; 1 Salk. 141. But if the deceased covenantee has been actually evicted in his lifetime, the right of action devolves to his personal representatives, as the real subject, to which in the former case such right is annexed, is gone, leaving nothing in the covenantee but a claim to damages, which of course is personal. Thus, where an action was brought by the executor of a vendee of lands for a breach of a covenant for quiet enjoyment entered into with the testator, his heirs and assigns, and the defendant contended that the action ought to have been brought by the heirs or assigns who had sustained the damage, and not by the executor; it was ruled by the Court, that the testator, having been evicted, he could have no heir or assign of this land, but the damages should be recovered by the executor, although executors were not named in the covenant, for he represents the person of the testator: *Lucy* v. *Levington*, 2 Lev. 26; 1 Vent. 175; see *Wade* v. *Paget*, 1 Br. C. C. 363. So where the owner of the fee excepted timber trees out of a demise, and the lessee covenanted not to fell or top them, it was held that for a breach of that covenant in the lifetime of the lessor, his executors might sue: *Raymond* v. *Fitch*, 2 Cr. M. & R. 508. But if the eviction or disturbance is not by one claiming the entire interest but only by an incumbrancer, the action belongs to the heir, and not to the executor; and where there is a mere covenant to convey and no conveyance executed, the action goes to the heir: *Wootton* v. *Cook*, Dy. 237; Anders. 53; Fitzh. N. B. 145 c. In that case, however, the agreement was under seal, and expressly made with the heirs of the purchaser. But in a modern case where the contract was not under seal, it was held that the administrator of the purchaser might maintain an action on a breach of the contract in the purchaser's lifetime, to recover the expenses of investigating the title and interest on the deposit: *Orme* v. *Broughton*, 4 Moo. & S. 417; and in *Knights* v. *Quarles*, 4 Moo. 532, it was held, on demurrer, that an administrator had a right of action against an

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attorney for accepting a bad and defective title to freehold hereditaments in the lifetime of the intestate, whereby his personal estate was much injured.

To whom damages recovered by a tenant for life belong.

Where a tenant for life recovers damages for a breach of covenant affecting the land, the damages so recovered are his absolute property, and no part of them belongs to the remainderman: *Noble* v. *Cass*, 2 Sim. 343. In order to sustain the doctrine contended for by the plaintiff in this case, it should have been made out that the tenant for life bringing an action for an injury done to the land represented the inheritance, in regard to his claim to damages; whereas it is conceived the fact is clearly otherwise, for the damages recovered by him, if the breach of covenant affected the entire inheritance, would be proportioned to the extent of his estate only, and the defendant would be liable to another action at the suit of the remainderman for his share of the injury. Considered in this point of view, the soundness of the decision is apparent.

Disclaimer in bankruptcy.

It may be here noted that the right of the trustee in bankruptcy to disclaim property which is burdened with onerous covenants, extends to freeholds which are so encumbered: see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 55, and *Re Beardsworth*, 28 W. R. 485; *Re Mercer and Moore*, 14 Ch. D. 287; and compare *English* v. *Barlow*, 48 L. T. 188. It appears from the remarks of *Jessel*, M. R., in *Re Mercer and Moore*, that upon a disclaimer of freeholds the estate will vest in the Crown.

CHAPTER IV.

AS TO SALES OF COPYHOLDS.

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Generally.

General Remarks.]—If the lord of a manor become possessed of a copyhold, part of the manor, he may grant it to a new copyholder, whether the copyhold became vested in him by escheat, forfeiture or surrender, or by descent or otherwise: Watk. Cop. ch. ii. This mode of dealing with copyholds is of course distinct from that which is intended to be considered in the following pages; and it may be sufficient in this place to note that the lord is bound by custom in thus dealing with his copyhold tenements, that he may grant whatever his title may be, provided it be lawful: *Doe* d. *Rayer* v. *Strickland*, 6 Q. B. 792; and that he may bar his right to grant the tenement as a copyhold, if he should make any conveyance of them which will operate at the common law, even though he make no more than a lease for years. The grant may also be made by the steward or deputy steward, whether in or out of the manor: see stat. 4 & 5 Vict. c. 35. A memorandum of the grant by the lord will be entered on the Court rolls in the same way as an ordinary admittance, except that the phraseology will vary, owing to the difference in the circumstances. The memorandum will state that the lord personally or by his steward, at a specified Court (or otherwise, as the case may be), granted the tenement to be held by copy of Court roll, at the will of the lord, according to the custom: see i. Watk. Cop. by Cow. p. 68. By sect. 6 of the Copyholds Act, 1887 (50 & 51 Vict. c. 73), the consent of the Lands Commissioners

Grant of copyholds by lord of manor.

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is necessary to the validity of any new grant of lands, not previously of copyhold tenure, to be held by copy of Court roll; and on such grant being made the lands will no longer be of copyhold tenure.

It has been seen that the process by which copyholds are conveyed by the tenant thereof is that of surrender by the vendor of the property into the hands of the lord of the manor, and the admittance of the purchaser by the lord as tenant in the place of the surrenderor: see *ante*, pp. 11, *et seq.* The nature of the interest of the unadmitted surrenderee has also been explained. In this place the frame of the documents which are in use in connection with this process fall to be considered.

Various customs of manors.

It is to be observed that the customs of various manors differ considerably with respect to the forms and language used in surrenders and admittances. Thus, the proper symbol for surrender may be a rod or a stick, or a straw, or other similar thing; or the proper operative words may be "surrender" or "bargain, sell, alien and convey," or the like; or, again, the proper words of limitation may be "to him and his," "to him, his sequels and assigns," or other phrases not apt according to the common law for passing an estate of inheritance: *Bunting* v. *Lepingwell*, 4 Rep. 29. Again, careful attention must be had to the custom of the manor with regard to the extent and nature of the estate which a copyholder may have in the land; for estates in copyhold may be in fee or for life or lives, with right of renewal, and the lord may refuse to accept a surrender which is calculated to limit the copyhold in a way not authorised by the custom: *Att.-Gen.* v. *Lewin*, 1 C. P. Coop. 51; *Flack* v. *Downing College*, 13 C. B. 945. It will, therefore, be found prudent to submit a draft of the surrender to the steward of the manor for his revision, so that there may be no difficulty when it is desired, to cause it to be entered on the Court rolls with a view to act upon it.

Whether corporations can be copyholders.

It appears that corporations aggregate cannot be copyholders. They are immortal; and therefore the lord would lose his fines and heriots; and they are incapable of doing homage or fealty or suit, or to perform the services due from a copyholder; for a

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corporation cannot appear except by attorney: i. Watk. Cop. 37, 242; ii. Watk. Cop. 176; Bro. *Fealty*, pl. 15; Co. Litt. 66 b; *Tonkin* v. *Croker*, 2 Ld. Raym. 864. If, therefore, on surrender to the use of a corporation aggregate, it seems that the lord may refuse to admit. In cases where it is desired to convey copyholds to a corporation aggregate, it must be done by means of a trustee, in whom and whose heirs the land should be vested in trust for the corporation: see and consider *Att.-Gen.* v. *Foyster*, 1 Anst. 116; *Brown* v. *Ramsden*, 2 Moo. 612.

Corporations sole.

There appears to be less difficulty in the case of a corporation sole, though the objection of immortality exists in regard to a corporation sole as well as in respect of a corporation aggregate. In conveying copyholds to a corporation sole it would probably be right that the surrender should be made to the use of a trustee for the corporation: see i. Watk. Cop. by Coventry, p. 299, n. With reference to the passage in that note which refers to Co. Litt. 66 b, as treating corporations sole and aggregate as being capable of receiving a grant as distinguished from a surrender of copyholds, it should be borne in mind that where a copyholder transfers his copyhold to another, he does so by surrender and admittance; but that where the lord makes a gift to a new copyholder of a portion of his demesnes he does so by grant: see, for example, *Roe* v. *Loveless*, 2 B. & Al. 453; *Doe* d. *Leach* v. *Whittaker*, 5 B. & Ad. 409. The objections which would lie against a transfer of lands to a corporation by a tenant obviously do not exist where the lord of his own act makes a corporation his tenant. It is probably with reference to cases where copyholds have thus been granted that it is said that though a corporation is immortal and cannot die, yet, by special custom, a heriot may be due on the death or avoidance of its head: ii. Watk. Cop. 155; and see (for an example) Fish. Cop. 81, n.

Charities.

Copyholds are within the Mortmain Act (9 Geo. 2, c. 36), and in order that copyholds may be validly conveyed to charitable uses the provisions of that Act must be complied with: *Att.-Gen.* v. *Lord Weymouth*, Amb. 20; 2 Bl. Com. 273; *Doe* d. *Thompson*

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v. *Pitcher*, 6 Taun. 359; *Arnold* v. *Chapman*, 1 Ves. 108; *Att.-Gen.* v. *Andrews*, 1 Ves. 225. The proper mode of effecting the object is to surrender to the uses of a deed containing a declaration of the trusts, such deed being executed and enrolled in accordance with the statute: see *Doe* d. *Howson* v. *Waterton*, 3 B. & Al. 149; *Att.-Gen.* v. *Foyster*, 1 Anst. 116; *Brown* v. *Ramsden*, 2 Moo. 612 (*a*).

Surrender of copyholds of married woman.

Husband and wife may, together, surrender the wife's copyhold lands (not being held to her separate use), she being, in such surrender, separately examined, apart from her husband, by the steward or otherwise, according to the custom of the manor, as to her voluntarily doing it: Gilb. Ten. 277; i. Watk. Cop. 60; *Bullock's Case*, 4 Rep. 23; *Driver* d. *Berry* v. *Thompson*, 4 Taun. 294; *Doe* d. *Shelton* v. *Shelton*, 3 A. & E. 265. It has been determined that a custom for a *feme covert* to surrender without her husband's consent cannot be supported, because "it is contrary to law and the policy of the nation, and tends to make married women independent of their husbands:" *Stephens* v. *Tyrell*, 2 Wils. 1. But see *Compton* v. *Collinson*, 1 H. Bl. 342, 343; *Taylor* v. *Phillips*, 1 Ves. 229. In the case of *Compton* v. *Collinson* it was decided that a surrender of a copyhold by a married woman without her husband would bar her heir. This power of a *feme covert* seems not to have been affected by the Fines and Recoveries Act. As to dispensing with separate examination, see *Ex parte Shirley*, 5 Bing. N. C. 226.

Conveyance of equitable interest of married woman.

An equitable interest of a married woman will pass, with her husband's concurrence, either by a surrender, after she has been privately examined, or by a deed acknowledged under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, ss. 77 and 90). So also of a married woman's equitable estate in customary freehold: *Torbuck* v. *Hewitson*, 19 L. T. (O. S.) 348.

Surrender out of court and out of manor.

A surrender might always have been made out of Court or even out of the manor, either to the lord or to the steward, without any special custom to authorise

(*a*) See further as to the requirements of the "Mortmain Acts," *ante*, Vol. IV., sub tit. MORTMAIN.

his so doing: Co. Litt. 59 a, and *Dudfield* v. *Andrews*, 1 Salk. 184; *Tukeley* v. *Hawkins*, 1 Ld. Raym. 76; and a surrender might be taken out of Court by a deputy steward: *Parker* v. *Neck*, 1 Comyns, 84; 1 Ld. Raym. 658; 1 Salk. 95; or (by virtue of special custom) by a bailiff, beadle, or reeve, or two tenants of the manor: Co. Litt. 59 a; Co. Cop. 154; 1 Roll. Rep. 125. But, where a surrender was made out of Court, it was formerly necessary that it should be presented by the homage at the next Court, or, by special custom, at a subsequent Court: Co. Litt. 62 a; *Taylor* v. *Wheeler*, 2 Salk. 449; 4 Vern. 564. The necessity for this formality was done away with by the stat. 4 & 5 Vict. c. 35, s. 89, which provides that the entry of the surrender made on the Court rolls of the manor shall be taken to be an entry made in pursuance of a presentment made at a Court holden for such manor by the homage assembled thereat. Generally.

It is incumbent on the lord to admit the new tenant in accordance with the surrender: see *post*, p. 326. It appears, therefore, that the surrender is, as regards the lord, the more important portion of the transaction, as it governs, subject to custom, his relations with the tenant, who is to be admitted under it; and it is necessary that the surrender should be in every respect such as is warranted by the custom, otherwise the lord may reject it.

Surrender of Copyholds.]—The entries of surrender and admittance on Court rolls are not to be regarded as deeds, but rather as the evidence of acts performed and words spoken in Court, set down at the time of their performance and utterance: ii. Watk. Cop. 395. Frame of surrender.

The entry of a surrender upon the Court rolls is a simple memorandum of the fact that the surrender has been made. It opens with the words "Be it remembered," and states that the surrenderor came before the lord or steward of the manor, and, in consideration of the purchase-money, the receipt of which is acknowledged, surrendered into the hands of the lord in the manner prescribed by custom, the

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parcels to the use of the surrenderee. The memorandum will also state whether the surrender was made into the hands of the lord personally, or by the hands of the steward or deputy steward; and whether it was made in or out of Court; and also whether the surrender was made by the tenant in person or by attorney. Any special matters as to the purchase-money, or as to the purpose of the surrender (*e.g.*, if it be for the purpose of barring an entail), or as to any covenant to surrender, are referred to in the body of the memorandum.

Description of parcels.

The description of the parcels should be the same as that which has been used in previous surrenders of the tenement; and if it be desired that a modern description should appear, the ancient form should also be used. The lord is entitled to refuse to accept a surrender in which the parcels are not described by the proper description which is on the Court rolls. This is so because the object of the entries in the roll is the preservation in a clear and precise manner of the history of each copyhold tenement. Accordingly the lord may also refuse a surrender which contains a general description of the tenements to which it relates, even though it refer to the parcels in a former surrender, in which the proper description was used: *Reg.* v. *Bishopstoke*, 8 Dow. P. C. 608; *Hayward* v. *Raw*, 6 H. & N. 308. The lord may also insist upon the surrender being so framed as to keep distinct the title of each tenement affected thereby; and though it is not necessary that each tenement should be dealt with by a separate instrument, it is needful that each should be surrendered by a separate clause: *Reg.* v. *Eton College*, 8 Q. B. 526; *Traherne* v. *Gardner*, 5 E. & B. 913. If there are any exceptions or reservations to be made they will be specified in the parcels in the same way as in a conveyance of freehold.

Uses of surrender.

The surrender should contain words limiting the estate which the surrenderee is to take, which must be consistent with the custom. The uses declared by the surrender may be to such uses as the surrenderor or any other person may appoint, or to any springing, shifting, or executory uses, pro-

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vided that the custom of the manor permits such uses. But the lord, in the absence of a special custom compelling him to accept it, may decline to accept a surrender, under which the tenancy would be shifted without his permission: *Boddington* v. *Abernethy*, 5 B. & C. 776; *Rex* v. *Oundle*, 1 A. & E. 283; *Flack* v. *Downing College*, 13 C. B. 945. It must be observed that copyholds are not within the Statute of Uses: Co. Cop. 54; 2 Wms. Saund. 12; therefore a surrender of copyholds to uses is not to be considered on the footing of a use or trust, raised by force of the statute; for, as copyholds are not within the statute, a surrender to uses is no more than a direction to the lord whom to admit; and the surrenderee, when admitted, is in by the grant of the lord (*b*), not of the surrenderor: *Rigden* v. *Vallier*, 2 Ves. 257; *Tille* v. *Cook*, 1 P. Wms. 76; Bac. Abr. 779.

The course of surrendering to such uses as the purchaser shall appoint, and subject thereto to the purchaser in fee, is frequently adopted in order to save the expense of an admittance. Where the custom will admit it, a surrender to such uses as a married woman shall appoint by will is valid, and the lord may be compelled to accept it; so also a surrender to such uses as a married woman shall by deed or will appoint, and subject thereto to her in fee to her separate use: *Driver* d. *Berry* v. *Thompson*, 4 Taun. 294; *Doe* d. *Blomfield* v. *Eyre*, 3 C. B. 557; *Flack* v. *Downing College*, 13 C. B. 945.

Position of surrenderor ~~upon~~ until admittance.

A surrender to uses giving the purchaser a power of appointment is not altogether desirable from the point of view of the surrenderor. After the surrender is made the surrenderor remains tenant to the lord until the surrenderee is admitted; and the lord is entitled to require from him the performance of all suits and services incident to the tenure and the payment of any fines which may fall due during the interval (as, for instance, in some manors, upon the change of lord by the act of God: 1 Watk. Cop.

(*b*) This is specially true in the case of copyholds for lives: see *King* v. *Lorde*, Cro. Car. 204.

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285). So also, in the event of the death of the surrenderor during the interval, a heriot will be due, and must be paid by his estate: 1 Watk. Cop. 147; *Doe* d. *Tofield* v. *Tofield*, 11 East, 246 (*c*). It would therefore appear prudent, where a surrender of this nature is contemplated, for the vendor to arrange that any fines or heriots which may be payable upon the admittance of the purchaser's appointee, shall be paid by the purchaser.

Voluntary surrender.

Copyholds are within the stat. 27 Eliz. c. 4; *Smith* v. *Garland*, 2 Mer. 123; *Doe* d. *Tunstill* v. *Bottriell*, 5 B. & Ad. 131; so that a voluntary surrender may be avoided by a subsequent surrender in favour of a purchaser for value.

Trusts of copyholds.

Copyholds may be vested in trustees upon such trusts as may be desired; and it is generally desirable to have the trusts of copyholds inserted in the surrender, and consequently upon the Court rolls; but if the parties do not wish it, the trusts may be omitted. It appears, however, that the steward has a right to call for a specification of the trusts, or to refuse that any reference whatever shall be made to them upon the rolls: see *Lord Kensington* v. *Mansell*, 13 Ves. at p. 244. The entry of trusts upon the Court rolls is desirable, because the title to copyholds should always appear upon the Court rolls; and if the deed containing the declaration of the trusts be lost, considerable difficulty might be found in proving the trusts. Even where the trusts of copyholds are declared by a separate deed, a memorandum thereof should, if possible, be entered upon the rolls, because in case of escheat (*d*), where the

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(*c*) Upon the same principle no heriot will be due upon the death of an unadmitted surrenderee: see *Kenebel* v. *Scrafton*, 8 Ves. 30; *Doe* d. *Shewen* v. *Wroot*, 5 East, 130.

(*d*) Escheat on failure of heirs is incident to the copyhold tenure as well as to the freehold tenure. But, in this case, as well as formerly in that of escheat for treason and felony, the escheat is to the lord and not to the Crown. Forfeiture of a copyhold tenement may result from any breach of the custom by which the tenement is held: see 1 Watk. Cop. ch. viii.

By sect. 4 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73), the lord retains his rights in case of escheat, notwithstanding enfranchisement.

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lord has consented to an entry of notice of the trusts on the Court rolls he is bound thereby, and cannot claim adversely: *Burgess* v. *Wheate*, 1 W. Bl. 167; *S. C.*, 1 Eden, 232; *Stockdale* v. *South Sea Co.*, 2 Atk. 141; *Peachy* v. *Duke of Somerset*, Prec. Ch. 573; 5 Cru. Dig. 581, s. 78.

Surrender by attorney.

A surrender may be made by attorney: *Combe's Case*, 9 Rep. 75; but there may be a custom that the surrender shall not be so made unless the attendance in person of the surrenderer is either impossible, or at any rate extremely inconvenient. And even without the existence of any special custom, a purchaser will not be compelled to rely on a power of attorney unless there be a necessity for it: *Mitchel* v. *Neale*, 2 Ves. 679; *Noel* v. *Weston*, 6 Madd. 50; *Richards* v. *Barton*, 1 Esp. 269. It is possible that the rules formerly in force with respect to surrenders by attorney may not now take effect. The 8th and 9th sections (*e*) of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), contain provisions removing from powers of attorney given for valuable consideration, and from powers of attorney, whether given for valuable consideration or not, expressed to be irrevocable for a fixed time therein specified not exceeding one year from the date of the instrument, the disadvantages formerly attaching to instruments of this kind. Where, therefore, a power of attorney to surrender is given for valuable consideration, it will fall within sect. 8, and acts performed under its authority will be valid, unless the donee of the power has himself consented to its revocation. If the power be not given for valuable consideration, it should be stated that it is to be irrevocable for a defined time, not exceeding one year from the date of the instrument, and acts performed during that period will be valid unless the donee of the power has himself consented to its revocation. It appears that a married woman could not formerly surrender by attorney: *Graham* v. *Jackson*, 6 A. & E. 811; but now, under sect. 40 of the Conveyancing and Law

(*e*) See *ante*, Vol. IV., sub tit. POWERS OF ATTORNEY, p. 903, where these sections are set forth.

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of Property Act, 1881 (44 & 45 Vict. c. 41), a married woman may appoint an attorney to do any act which she might herself do (*f*). If a copyholder covenants to surrender, he does not commit a breach of his covenant by refusing to appoint an attorney to surrender for him : *Symons* v. *White*, Cro. Cas. 299.

The attorney should be appointed by deed, and may be a person under any disability except that of unsoundness of mind. The attorney should surrender in the appropriate manner prescribed by the custom, either in the name of the principal or in his own name, expressly under the authority of his power of attorney (*g*). If the attorney exceeds his authority, his act will be valid only as far as his authority extends : *Carter* v. *Carter*, 3 K. & J. 617.

When an admittance is presumed as against the lord.

As to Admittance to Copyholds.]—The essential part of the admittance is the consent of the lord to the substitution of the new tenant in place of the former tenant. An admittance will therefore be presumed (*h*), as against the lord, where he has treated the alienee as if he were tenant of the tenement. Thus the lord was held to have ratified the tenancy and admitted the alienee when he had summoned him to sit upon the homage jury, and also where he had accepted from him a fine or rent in respect of the tenement : *Rawlinson* v. *Green*, Poph. 127 ; *Brown* v. *Dyer*, 11 Mod. 73. But the act, in order to have this effect, must be unequivocal in its nature, and not capable of being referred to any other ground. The admittance of the alienee of an unadmitted surrenderee will not be held to imply the admittance of the latter : *Doe* d. *Vernon* v. *Vernon*, 7 East, 8 ; *Doe* d. *Tofield* v. *Tofield*, 11 East, 246 ; *Matthew* v. *Osborne*, 13 C. B. 919.

Admittance out of court and out of manor.

There was formerly some doubt as to whether the admittance of a tenant out of Court, or out of the

(*f*) See *ante*, Vol. IV., sub tit. Powers of Attorney, p. 861, where the section is set out at length.

(*g*) See *ante*, Vol. IV., sub tit. Powers of Attorney, p. 918, for precedents of power of attorney to surrender and to take admittance.

(*h*) A surrender was, as between vendor and purchaser, presumed in *Wilson* v. *Allen*, 1 J. & W. 614.

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manor was lawful: see 1 Watk. Cop. 316; 1 Scriv. Cop. 129; *Tukely* v. *Hawkins*, 1 Ld. Raym. 76; 4 Rep. 26 b; but by stat. 4 & 5 Vict. c. 35, s. 88, it is provided that admittances may be made out of the manor, and without holding a Court for the manor, either by the lord or by the steward or his deputy-steward.

Form of admittance.

Where the admittance is made immediately after the surrender, it commences with the word "whereupon," and states that the surrenderee came before the lord, the steward, or the deputy-steward, either personally or by attorney, according to the facts, and prayed to be admitted; and that he was admitted in customary form; and the memorandum concludes with a statement of the payment of the fine, and, usually, of the respiting of the fealty (*i*). Where an interval elapses, there arises the necessity for recitals, sufficient to show when and at what Court the surrenderee made his claim for admittance; and if the surrender was to such uses or such person as the purchaser should appoint, it will be needful to show by recitals how the title of the applicant for admittance arose.

Surrenderor a trustee for the unadmitted surrenderee.

As between a vendor and purchaser, the important part of the transaction is the surrender. Where the vendor has surrendered to the use of the purchaser, he is, *sub modo*, trustee for his surrenderee, and the title of the surrenderee will, upon his admittance, relate back to the date of the surrender, so that he can bring an action to recover the copyhold, laying the demise at any time subsequent to the surrender, though he must be admitted before he can bring his action: *Roe* v. *Hicks*, 2 Wils. 15; *Rex* v. *Dillington*, 1 Freem. 496; *Grantham* v. *Copley*, 2 Wms. Saund. 422; *Benson* v. *Scott*, 1 Salk. 185; *Doe* v. *Bennington*, 16 East, 208; *Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 600; the right to admittance will descend to the heir, and free bench or curtesy will attach, even before admittance: *Benson* v. *Scott*,

(*i*) Fealty was the personal service of the copyholder, which was secured by oath: its object being to bind the copyholder to the service of his lord only, to the exclusion of all others.

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1 Salk. 185; *Vaughan* v. *Atkins*, 5 Burr. 2765. Similarly the tenant may recover from the surrenderor the mesne profits, on the principle that the latter is a trustee for him: *Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 600; *Roe* v. *Hicks*, 2 Wils. 15. But the title of the purchaser is not complete until he has been admitted: *Berry* v. *Greene*, Cro. Eliz. 349; *Doe* d. *Shewen* v. *Wroot*, 5 East, 132; *Rayson* v. *Adcock*, 9 Jur. (N. S.) 800.

Admittance must be in accordance with the surrender.

The duty of the lord or the steward in respect of admittance is governed by custom, which requires that the admittance shall be in accordance with the terms of the surrender: Burt. Comp. 1276. Thus where the surrender was absolute, and the admittance was made upon condition, the admittance was held to be good, the condition being disregarded: *Taverner's Case*, 4 Rep. 27. So, if the surrenderee and another person be admitted together, the admittance will be held to enure for the benefit of the surrenderee alone. And if the lord allow a surrender to such uses as the purchaser shall appoint, he is bound, if the purchaser exercise his power, to admit the appointee: *Glass* v. *Richardson*, 9 Ha. 689; 2 De G. M. & G. 658; *Eddlestone* v. *Collins*, 3 De G. M. & G. 1.

The lord can be compelled to admit by a *mandamus* to him or to the steward: *Reg.* v. *Powell*, 1 Q. B. 352; but the issue of the *mandamus* is a matter of discretion, and may be refused: *Reg.* v. *Garland*, L. R. 5 Q. B. 269. The lord cannot be compelled to admit by attorney, for he is in strict law entitled to claim fealty, and fealty is personal: *Coombe's Case*, 9 Rep. 75; *Blunt* v. *Clark*, 2 Sid. 61; fealty is, however, usually respited. Admittance may be taken by attorney, any person agreed upon between the lord and the tenant acting as attorney; nor need the attorney be appointed by deed. Provision is made by 1 Will. 4, c. 65, s. 3, for the admittance of married women and infants, and by 16 & 17 Vict. c. 70, s. 108, for the admittance of the committees of lunatics. The lord is not bound, unless by special custom, to admit to several tenements at once.

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Admittance of particular tenant, joint tenants, or tenants in common.

The admittance of the particular tenant enures for the benefit of all who are in remainder, unless there is a special custom requiring the admittance of a remainderman: *Doe* d. *Whitbread* v *Jenney*, 5 East, 522. So also the admittance of one joint tenant as coparcener is the admittance of all; but the case is otherwise with tenants in common, all of whom must be admitted separately.

Admittance of trustees.

Where a testator devises (*k*) copyholds to trustees upon trust to sell, the trustees may be compelled to be admitted: *Ex parte Butler*, 1 Atk. 216, Amb. 73; and in that event the fine may be very heavy. The prudent course, where a testator desires that his copyholds shall be sold after his decease, appears to be to give his executors or trustees a common law power of sale: as to the operation of which see *infra*, p. 334. But where copyholds are devised upon trust to sell, the heavy fines payable on the admittance of more than one trustee may be avoided. For instance, all the trustees but one may disclaim; but they must disclaim before doing any act implying ownership on their part, otherwise the lord can compel the payment of the full fine: see *infra*, p. 339. Or the devisees in trust may omit to take an admittance under the will, presenting the customary heir for admittance as tenant of the lord, and obtaining from him a surrender to the use of the purchaser (see *Garland* v. *Mead*, L. R. 6 Q. B. 441; *Everingham* v. *Ivatt*, L. R. 8 Q. B. 388); the devisees afterwards releasing by deed to the purchaser their right to admittance: *Kite and Queinton's Case*, 4 Rep. 25; *Doe* d. *Milner* v. *Brightwen*, 10 East, 595; *Steele* v. *Waller*, 28 Beav. 466. The lord would not be able in such a case to refuse to admit the purchaser: *Hall* v. *Shear-Brook*, Cro. Jac. 36; *Rex* v. *Wilson*, 10 B. & C. 80; *Garland* v. *Mead*, L. R. 6 Q. B. 441. If the former plan be adopted, a fine would be payable on the admittance of the non-disclaiming trustee; and in the

(*k*) The effect of 1 Vict. c. 26, s. 3, is to enable a copyholder, in every case, to devise his estate without the necessity of a surrender to the use of his will; and the legal estate is in the customary heir until the admittance of the devisee: *Garland* v. *Mead*, L. R. 6 Q. B. 441.

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second, it would be payable on the descent to the heir: *Reg.* v. *Dullingham*, 8 A. & E. 858; *Hall* v. *Bromley*, 35 Ch. D. 642. But if the trustees are not devisees in trust, but only invested with a common law power of sale, and can succeed in selling before the holding of the third Court (*l*) after the death of the testator, the only fine payable would be that upon the admittance of the purchaser.

Where an equitable tenant for life sells under the powers of the Settled Land Act, 1882, it appears that there is no necessity for the admission of the trustees, and that the lord cannot claim any fine except that payable on the admission of the purchaser: *Re Naylor & Spendla's Contract*, 34 Ch. D. 217.

Copyholds and customary lands are excluded from the operation of sect. 34 of the Conveyancing and Law of Property Act, 1881, by which provision is made for vesting the property subject to a trust in new or continuing trustees by virtue of a vesting declaration by the appointer. The reason for this exclusion appears to be that the rights of the lord might be prejudicially affected if lands of these tenures were allowed to remain within the scope of the section.

Admittance by attorney.

Admittance to copyholds may be by attorney: see sect. 2 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73).

Covenants for Title.]—No covenants for title can be inserted upon the Court rolls: it is therefore usual, when there is no antecedent covenant to surrender, to embody them in a separate deed of covenant, which is handed to the purchaser on completion. It is true that the advantage which a copyholder has of ascertaining the state of the title by examining the Court rolls, more than counterbalances any

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Seizure *quousque.*

(*l*) The lord is entitled, where the copyhold is of inheritance, to enter if the tenancy be left vacant. The heir may not be at hand, or the succession disputed. Where, therefore, a tenant died, the lord made proclamation in the court of the manor for the heir to come in and make his claim. If the heir does not appear at the third proclamation, the lord is entitled to seize *quousque*, that is, until the heir does appear and make his claim.

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security to be obtained from covenants for title; but it is to be noted that the possession of such deeds of covenant is *primâ facie* evidence of unincumbered ownership, which does not belong to the custody of copies of Court rolls, as the latter may always be obtained from the steward, though a deposit of them has been held to create an equitable mortgage: *Whitbread* v. *Jordan*, 1 Y. & C. Ex. 303; *Pryce* v. *Bury*, 2 Drew, 11.

The 7th section of the Conveyancing and Law of Property Act, 1881, does not apply to surrenders of the word "conveyance" as defined by sect. 2 (v.); seeing that surrendersare not included in the meaning, and are, indeed, expressly excluded from operation of sect. 7 by sub-sect. 5. It is, therefore, still necessary, in cases where a covenant to surrender is not used, to adopt the old plan of a separate deed of covenant.

Frame of deed of covenant.

The deed will recite the surrender, and then proceed to witness that in consideration of the purchase-money the vendor covenants for title in the usual form. The covenants for title are, *mutatis mutandis*, the same as those entered into upon a conveyance of freeholds. Should the arrangement contemplate any covenants by the purchaser (*e.g.* for building), these will follow in a separate *testatum*, the covenants being expressed to be entered into in consideration of the surrender.

Frame of covenant to surrender.

Covenants to surrender Copyholds.]—Covenants to surrender are framed on the same principles as ordinary conveyances of freeholds. They may or may not contain recitals; but where recitals are employed, they will, as a rule, be confined to a statement of the agreement for the sale: for the title of the vendor will usually appear upon the Court Rolls, so that it will be unnecessary to set it forth. The consideration will be stated to be the sum agreed upon; and the covenant will be a covenant forthwith to surrender to the uses agreed upon. The parcels will be described as they appear upon the Court rolls. It was usual in covenants to surrender, before the Conveyancing and Law of Property Act, 1881, to omit from the general words

Covenant to Surrender.

any reference to the mines and minerals where these were (as they usually are) the property of the lord; the statutory general words do not include these. The estate clause was also sometimes omitted; the 63rd section of the Conveyancing and Law of Property Act, 1881, enacts that every conveyance shall, by virtue of the Act, be effectual to pass all the estate, right, title, interest, claim and demand of the conveying parties. A covenant to surrender is within the term "conveyance" (see sect. 2 (v.)), but it may be doubted whether a covenant to surrender can be held to operate under this section; the point seems, however, not to be of much importance. The statement of the uses to which the copyholds are to be surrendered is sometimes followed by a declaration or further covenant that, until surrender, the vendor will stand seised of the copyholds in trust for the purchaser. In ordinary cases, where the purchase-money is paid on the execution of the covenant, this clause may safely be omitted: see *post*, p. 331. The deed, as formerly drawn, then contained the covenants for title. These may now be implied by virtue of sect. 7 of the Conveyancing and Law of Property Act, 1881, by use of proper words, for by sect. 2 (v.) of that Act, a covenant to surrender is included within the definition of a "conveyance"; and the vendor is therefore usually made to "convey as beneficial owner," as well as "covenant to surrender."

Disadvantages of covenant to surrender.

The covenant to surrender is performed by the subsequent surrender to the uses agreed upon and specified in the deed of covenant. Until the actual surrender is made, the position of the covenantor is not altogether satisfactory. The bare covenant amounts to no more than a mere agreement for sale, which, though under seal, is but an unexecuted contract, and the covenantee has no right or title to the land itself (*m*). The covenantee's position is strengthened if there be in the deed of covenant a declaration of trust by the covenantor in favour of the covenantee; in which case the covenantor

(*m*) The covenant to surrender is binding upon the parties, but cannot be enforced by the lord: *Hall* v. *Bromley*, 35 Ch. D. 642.

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becomes an express trustee for him: *Re Carpenter*, Kay, 418; *Re Propert*, 28 L. J. Ch. 948; *Re Collingwood*, 6 W. R. 536. For this reason, it has been said that the declaration of trust should never be omitted; but it appears that the same result is attained where the purchase-money is paid on the execution of the deed of covenant, whereupon the contract is executed, and the covenantor becomes *ipso facto* a trustee for the covenantee, who can obtain a vesting order under the Trustee Act, 1850, without the necessity of an action to declare the covenantor, or in the event of his death, his heir, a trustee: *Re Crowe's Mortgage*, L. R. 13 Eq. 26; *Re Cuming's Trusts*, L. R. 5 Ch. 72. Therefore, if the purchaser be content with such security as is afforded by the fact that the vendor is a trustee for him, he may pay his purchase-money, and omit the declaration of trust. It must, however, be borne in mind that the purchaser acquires an equitable title only; and that if the vendor makes a subsequent sale for value, and actually surrenders to the use of the subsequent purchaser without notice, the latter will have acquired the advantage of the legal estate, and the first purchaser will not be able to oust his title: *Oxwick* v. *Plumer*, 5 Bac. Abr. 43; *Plumbe* v. *Fluitt*, 2 Anst. 432; *Whitbread* v. *Jordan*, 1 Y. & C. C. C. 304; *S. C.*, 4 Y. & C. C. C. 563. It may, therefore, be suggested that the most prudent course would be for the purchaser to have the express declaration of trust inserted in the covenant to surrender, and to retain his purchase-money until the surrender is actually made. Covenants to surrender are principally used where copyholds are being conveyed together with lands of other tenures; and in cases of this kind it may be difficult to carry out this suggestion, unless the purchase-money can be apportioned between the copyholds and the other lands. Where the course proposed cannot be adopted, the covenantor should require the performance of the covenant as soon as possible after the execution of the deed.

When copyholds may be

Conveyance of Copyholds by Deed.]—Deeds are sometimes used for the conveyance of interests

Conveyance by Deed.

conveyed by deed.

in copyhold lands. Thus, the lord may, by severing the tenement from the manor, put it out of the power of the tenant to convey in the usual manner by surrender; in such cases it appears that he may convey by deed in the usual form: *Phillips* v. *Ball*, 6 C. B. (N. S.) 811.

Conveyances by co-owners to each other.

Where one of several co-owners desires to convey his share of the tenement to another, he may sometimes do so by deed alone. Thus, in the case of joint tenants, the first admittance is of them and every of them, to the whole tenement: *Wase* v. *Pretty*, Winch. 3; and one joint tenant can release his estate to another by deed, without surrender and admittance, and, as a general rule, should do so. So, if one coparcener release by deed to another, it is good; for the coparcener to whom the release is made is already in the tenancy: Co. Litt. 273 b; Gilb. Ten. 73; *Wakeford's Case*, 1 Leon. 102. But if a joint tenant or a coparcener surrender to the use of a co-tenant or coparcener, the surrenderee must probably be admitted in due course. Tenants in common, on the contrary, are in the tenancy only in respect of their undivided shares, and they must convey to one another by the usual course of surrender and admittance.

Equitable estates in copyholds.

The legal estate in copyholds alone is capable of transfer by the ordinary method of surrender and admittance. Equitable estates in copyholds cannot be surrendered (subject to the exceptions noticed *infra*), but may be transferred by deed in the usual form (*m*); and the same method must be adopted for the assignment or conveyance of contingent or executory interests in copyholds: *Doe* d. *Blacksell* v. *Tomkyns*, 11 East, 185. On the other hand, a vested estate in remainder may be conveyed by surrender and admittance: see Williams R. P. 369.

(*m*) So, where a person has an equitable estate in copyholds, such equity will pass by will without a surrender. Nor can the devisee require admittance, as he will not become tenant to the lord: *Carr* v. *Ellison*, 3 Atk. 73; *Tufnell* v. *Page*, 2 Atk. 37, n.; 2 P. Wms. 261; *Allen* v. *Poulton*, 1 Ves. 121; *Att.-Gen.* v. *Andrews*, 1 Ves. sen. 229; *Burkitt* v. *Burkitt*, 2 Vern. 499; *Carey* v. *Askew*, 1 Cox, 244; *Macnamara* v. *Jones*, 7 Br. C. C. 480; *King* v. *King*, 3 P. Wms. 360.

Conveyance by Deed.

Under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), sects. 50 and 53, equitable estates in copyholds may be barred either by deed or by surrender. If the entail be barred by deed, the deed must be enrolled within six months of its execution: *Honeywood* v. *Foster*, 30 Beav. 1; *Gibbons* v. *Snape*, 32 Beav. 130; 1 De G. J. & S. 621.

Bar of equitable estates tail by surrender or deed.

There were several modes of disentailing copyholds prior to the Fines and Recoveries Act. Estates tail in copyholds were barrable by recovery or by forfeiture and regrant: *Pilkington* v. *Stanhope*, 1 Sid. 314; 2 Keb. 127; *Pilkington* v. *Bagshawe*, Sty. 450; *Carr* v. *Singer*, 2 Ves. 606; and by surrender, where there was no custom to bar by recovery: *Doe* d. *Dauncey* v. *Dauncey*, 7 Taun. 674; *Roe* d. *Bennett* v. *Jeffrey*, 2 M. & S. 92; *Doe* d. *Mason* v. *Mason*, 3 Wils. 63; *Carr* v. *Singer*, 2 Ves. sen. 606; *Gould* v. *White*, Kay, 683. There were, in some manors, concurrent customs for barring entails, and such customs were good: *Doe* d. *Whalhead* v. *Ossingbrooke*, 2 Bing. 70; *Everall* v. *Smalley*, 2 Str. 1197; 1 Wils. 26; *Doe* d. *Wightwick* v. *Truby*, 2 W. Bl. 944.

The inrolment of the disentailing deed under sect. 53, may be compelled by *mandamus* to the steward: *Crosby* v. *Fortescue*, 5 Dow. P. C. 275. Where the consent of the protector is given by a separate deed, the deed must have been executed on or before the day of the execution of the disentailing deed, and apparently must be enrolled also at the same time as, or before, the principal deed: see Dart, V. & P. 690, note (*x*). The inrolment of the deeds in the Court rolls is sufficient, and further inrolment is dispensed with by sect. 54 of the Act. As to what is a sufficient inrolment, see *Boyd* v. *Pawle*, 14 W. R. 1009.

Surrenders by married women of equitable estates.

So also by sect. 90 of the same Act a surrender by a wife with the concurrence of her husband, she having been separately examined, of copyholds in which she has an equitable estate or interest, is good and valid: see also sect. 90. But both the exceptions above referred to, though permitted by statute, are in conflict with the general principle.

Conveyance by Deed.

Admittance of successive tenants.

The lord is only entitled to have either a tenant on the rolls in respect of the tenement, or possession of the tenement; therefore, where copyholds are devised to one for years, remainder to another in fee, and the admittance of the latter was made as *in praesenti*, it was held that the lord could not compel the termor to be admitted: *Everingham* v. *Ivatt*, L. R. 7 Q. B. 683; 8 Q. B. 388. The proper person to be admitted is the person in whom the legal estate is vested: *Allen* v. *Bewsey*, 7 Ch. D. 453; and where the legal estate is devised to trustees, it will be incumbent on them to acquire it by admittance: *Reg.* v. *Garland*, 8 Q. B. 269.

Bargain and sale of copyholds under a common law power.

Where a testator authorizes his executors to sell copyholds, as if he "order and direct his executors" to sell, they convey the copyholds by a bargain and sale, and the appointee under such deed will be admitted, and will pay one fine only: for the purchaser takes immediately under the will (*n*): 1 Watk. Cop. 105, 127, 334, 353; *Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400; the legal estate in the meantime descends upon the heir, and if he be voluntarily admitted, he must pay his own fine.

Where this is so, the bargain and sale will clearly be within the 5th sub-section of sect. 7 of the Conveyancing and Law of Property Act, 1881, and the use of proper words will imply in the deed the usual covenants for title. In cases such as these, the sale must be made in good time, that is, before the lord has time to make three proclamations, and seize *quousque*, and then the lord cannot refuse to admit as tenant the nominee of the vendors: *Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400.

Lands Clauses Consolidation Act.

Where copyholds are purchased under compulsory powers, they are conveyed by deed under sect. 95 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which runs as follows:—

(*n*) There must be remembered the distinction between cases where the trustees or executors take a mere power to sell, and those in which the estate is devised to them upon trust to sell in such a way as that they take an interest in the copyhold: as to which see *ante*, p. 327.

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"Every conveyance to the promoters of the undertaking, of any lands which shall be of copyhold or customary tenure, or of the nature thereof, shall be entered on the rolls of the manor of which the same shall be held or parcel; and on payment to the steward of such manor of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof, he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect in respect of such copyhold or customary lands, as if the same had been of freehold tenure, nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed."

A deed under this section would appear to be a deed giving a right to possession of copyholds, and therefore to be a deed in which, by the 7th section of the Conveyancing and Law of Property Act, 1881 (see sub-sect. 5), the use of appropriate words will secure that the proper covenants shall be implied therein.

Copyholds purchased by a public company under the provisions of this Act are to be enfranchised by the purchasers, so as to make them freeholds in their hands, compulsory powers for this purpose being given to them: see sect. 96; until they are enfranchised, the lands are to be subject to the accustomed fines, rents, heriots and services.

The deed must be entered by the steward upon the Court rolls of the manor; and he is entitled to the same fees as would be due upon a surrender of the copyholds; but the steward cannot claim to be paid the fees which would be due to him upon an admittance of a purchaser: *Cooper* v. *Norfolk Rail. Co.*, 3 Exch. 546; 6 Rail. Ca. 94.

Copyholds of bankrupt.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), gives, by sect. 56, to the trustee in bankruptcy full power to sell all or any part of the property of the bankrupt, and to give receipts for any moneys receivable by him. With respect to copyholds of a bankrupt, it is enacted by sect. 50 as follows:—

"(4.) Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee

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shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly."

Therefore, where a trustee in bankruptcy sells copyholds forming part of the bankrupt's estate, he will not be admitted, but will merely convey by deed, in the same manner as if he were exercising a power of appointment limited to him under a surrender to such uses as he should appoint. The bankrupt may be compelled, under sect. 24, to join in the conveyance; and when he does so, it is probable that he would join in it in order to covenant to surrender the copyholds to the use of the purchaser, as that appears to be the only thing which the bankrupt could, by joining in the conveyance, effectually do. There appear, however, to be two objections to the employment of this course. The Act lays it down that the trustee is to convey as if he were exercising a power of appointment; so that the purchaser would have the right to claim admittance apart from any concurrence of the bankrupt, and under a title essentially differing from, and, in fact, paramount to, that which he would have if the bankrupt covenanted to surrender to his use; so that the surrender, if made, would be absolutely valueless, and might only entail needless cost upon the estate. Further, his concurrence, for whatever purpose, would be of small importance, seeing that, by sect. 35, the annulment of an adjudication does not affect anterior proceedings under it. It may also be doubted whether the covenant could be enforced as against the bankrupt covenantor.

Where the trustee exercises this power, the deed would be a deed conferring a right to admittance to copyholds within the meaning of the Conveyancing and Law of Property Act, 1881, sect. 7 (5); and the statutory covenant against incumbrances may therefore be imported by the use of appropriate words.

Trustee Act, 1850.

By sect. 28 of the Trustee Act, 1850, vesting orders as to copyholds shall, if made with the consent of the lord, vest the land without surrender or

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admittance; or a person may be appointed to convey: see *Ayles* v. *Cox*, 17 Beav. 584. The consent of the lord is not necessary before making a vesting order, but the order will not have the effect of a surrender and admittance; and an order so made does not prejudice the right of the lord to fines: *Paterson* v. *Paterson*, L. R. 2 Eq. 31; *Re Flitcroft*, 1 Jur. (N. S.) 418. See, however, *Cooper* v. *Jones*, 2 Jur. (N. S.) 59; and *Re Howard*, 3 W. R. 605. The person in whom the property is vested by an order, made without the consent of the lord, will apply for admittance as if he were a surrenderee: see *Bristow* v. *Booth*, L. R. 5 C. P. 92. Where the lord consents (see *Ayles* v. *Cox*, 17 Beav. 584; *Cooper* v. *Jones*, 2 Jur. (N. S.) 59) neither surrender nor admittance is necessary. For the form of vesting order, see *Re Crowe's Mortgage*, L. R. 13 Eq. 26.

If a person be appointed to convey copyholds, he will surrender in the usual way, and the surrenderee must be admitted: *Re Lane and Irving*, 12 W. R. 710; and see *Re Hey*, 9 Ha. 221; *Re Collingwood's Trust*, 6 W. R. 536; and *Re Cuming*, L. R. 5 Ch. 72.

Where payable.

Fines, &c.]—A fine is payable to the lord upon change of tenancy in the copyhold: Co. Litt. 59 b; *Earl of Bath* v. *Abney*, 1 Burr. 206. A fine is also in some cases payable upon the death of the last admitting lord: see *Lowther* v. *Raw*, 2 Br. P. C. 451; *Somerset* v. *France*, 1 Stra. 654; but not on alienation by the lord: Co. Lit. 56 b. It is payable on admittance to each separate tenement to which the purchaser is admitted: Co. Cop. 56; *Taverner* v. *Cromwell*, 4 Rep. 27 a; *Hobart* v. *Hammond*, 4 Rep. 28 a; *Grant* v. *Astle*, Doug. 722.

The fine on alienation is usually payable only on admittance. If a fine be payable on surrender, it must be by special custom: see *Holland* v. *Lancaster*, 2 Vent. 134; Co. Cop. 56. It is not payable until after the surrenderee has, by admittance, become the tenant of the copyhold; and therefore the fine is not payable by a vendor who has undertaken to pay the cost of admittance or to surrender and assure at his own cost: *Hobart* v.

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Hammond, 4 Rep. 28 a; *Graham* v. *Sain*, 1 East, 632; *Reg.* v. *Wellesley*, 2 E. & B. 924; and if the purchaser refuse to pay the fine, it is a forfeiture: *Fish* v. *Rogers*, 1 Roll. Abr. 506; *R.* v. *Hendon*, 2 T. R. 484. But, if a copyholder covenant to surrender, and, before a surrender be actually made, the covenantee assign his interest, one fine only will be due to the lord upon the admission of the assign of the covenantor, and the lord will be obliged to admit the assign accordingly: *R.* v. *Hendon*, 2 T. R. 484; 1 Watk. Cop. 103, 294.

Amount of fines.

The amount of the fine varies in different manors; but it is either certain or arbitrary. The nature of the fine must be determined by the rolls of the manor: *Allen* v. *Abraham*, 2 Bulst. 32. If it be a certain fine, it is either a fixed sum for each admittance, or it is ascertained by reference to the area or the annual value of the tenement, or it may be assessed by the homage or by umpires: *Titus* v. *Perkins*, 3 Mod. 132; *King* v. *Dillington*, 1 Freem. 494; *Freeman* v. *Phillips*, 4 M. & S. 486. Where the fine is arbitrary, it must be reasonable: *Morgan* v. *Scudamore*, 2 Ch. Rep. 134; *Doe* v. *Muscott*, 12 M. & W. 832; *Hayward* v. *Raw*, 6 H. & A. 308; *Douglas* v. *Dysart*, 10 C. B. N. S. 688. See also with regard to the amount of arbitrary fines: *Grant* v. *Astle*, 2 Doug. 722; *R.* v. *Boughey*, 1 B. & C. 505; *Richardson* v. *Kensil*, 5 M. & Gr. 485; *Earl Verulam* v. *Howard*, 5 Moo. & P. 148; *Dean of Ely* v. *Caldecott*, 8 Bing. 439; *Curtis* v. *Scales*, 14 M. & W. 444. Where the lord is entitled to a reasonable fine, he may demand and recover it by the description of so many years improved annual value of the tenement, without stating in money the precise value of the fine: *Fraser* v. *Mason*, 10 Q. B. D. 398; 11 Q. B. D. 574.

In manors where the custom is that a fine is payable only on the first admittance of a tenant, there is no general custom that a purchaser of several tenements can require the lord to admit him to one or more of such tenements, and to the remainder at a subsequent time. A special custom that the purchaser shall be admitted to all the tenements purchased by him at the same time, and pay a general

fine in respect of them all is valid: *Johnstone* v. *Earl Spencer*, 30 Ch. D. 581. Fines, &c.

Where copyholds are surrendered to the use of two or more as joint tenants, the lord is entitled to a fine from each. In many manors the custom is that the first who is admitted pays a full fine, the second half, the third a quarter, and so on; so that no matter how numerous they may be the fines cannot amount to twice the single fine: *Wilson* v. *Hoare*, 2 B. & Ad. 350; 13 A. & E. 236; *Shepherd* v. *Woodford*, 5 M. & W. 608. The lord may not refuse to admit one joint tenant until all have paid their fines: *Reg.* v. *Wanstead*, 18 Jur. 310. A devisee of copyholds may renounce: *Thomson* v. *Leach*, 2 Ventr. 198; but he cannot do so after he has committed acts implying ownership over the land. Therefore, where copyholds were devised to three joint tenants, two of whom, before admittance, but after the commission of such acts, executed a disclaimer, it was held that the disclaimer was void, and that the lord was entitled to a fine as upon the admittance of them all: *Bence* v. *Gilpin*, L. R. 3 Ex. 76. See as to admittance of trustees, *ante*, p. 327. Fines on admittance of co-tenants.

Coparceners, however, make but one heir, and are entitled to be admitted on the payment of one fine: *Reg.* v. *Bonsall*, 3 B. & C. 173. Coparceners.

Where copyholds are conveyed to tenants in common, each must pay the full fine, fees, and stamp. Tenants in common.

Where a copyholder makes a disposition of his tenement, under which he takes an estate differing from that he formerly had, he must pay a fine: *Roe* d. *Noden* v. *Griffiths*, 4 Burr. 1953.

Where copyholds are surrendered to use for life or years, with divers remainders over, there is only one admittance necessary, and without prejudice to the lord's rights as regards fines, but by custom one fine only is generally payable: *Blackburne* v. *Graves*, 1 Mod. 102; 1 Vent. 260; *Gravenor* v. *Todd*, 4 Rep. 23 a; *Barnes* v. *Corke*, 3 Lev. 308; *Dell* v. *Hayden*, Moore, 358; *Tipping* v. *Bunning*, Moore, 465; *Auncelme* v. *Auncelme*, Cro. Jac. 31. Where only one fine is payable, upon an admittance of a particular tenant, the lord may assess the whole fine upon him, or apportion it between the particular Fines on surrender to uses.

Fines, &c.

tenant and the remainderman, but he cannot charge the whole on the remainderman: *Lord Kensington* v. *Mansell*, 13 Ves. 246; see also as to fines on surrenders to uses, *Barnes* v. *Corke*, 3 Lev. 308; *Phypers* v. *Eburn*, 3 Scott, 634; *Dean of Ely* v. *Caldecott*, 8 Bing. 439; *Brown's Case*, 4 Rep. 21; *Blackmore* v. *Graves*, 1 Vent. 26 a; *Fitch* v. *Stuckley*, 4 Rep. 23 a; *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522.

What fines payable on admittance under surrender by joint tenants.

Upon the admittance of a purchaser under a surrender of copyholds by several joint tenants, it would seem probable that one fine only is payable; for the lord is not, except by special custom, entitled to more than one heriot: *Padwick* v. *Tynedale*, 1 E. & E. 184. Also joint tenants and coparceners make but one grant: Co. Cop. 66.

Under surrender by particular tenant and remainderman.

Where a particular tenant and remainderman surrender to the use of a purchaser, the latter, upon admittance, pays one fine only; for one estate only is conveyed: Co. Cop. 56; but the surrenderee of the remainderman alone must pay a fine, for the estate in remainder is a tenement as well as that in possession: *Auncelme* v. *Auncelme*, Cro. Jac. 31; *Blackburne* v. *Graves* (No. 2), 1 Mod. 120; *Barnes* v. *Corke*, 3 Lev. 308.

Under surrender by tenants in common.

Where tenants in common convey to a purchaser, he has to pay a full fine and full fees and stamp for each tenant's share: *R.* v. *Manor of Everdon*, 16 L. J. Q. B. 18; *Reg.* v. *Eton College*, 8 Q. B. 536; *Evans* v. *Upsher*, 16 M. & W. 675. It was formerly held that the lord was entitled to a similar number of fines in a subsequent alienation by a purchaser from tenants in common: *Attree* v. *Scutt*, 6 East, 476; but this use has been overruled; and, in such cases, the whole inheritance being reunited in the one person, only one fine is thenceforward payable: *Garland* v. *Jeykyll*, 2 Bing. 273; *Holloway* v. *Berkeley*, 6 B. & C. 2.

Contribution by remainderman.

Where a particular tenant is admitted, and pays the fine, he can compel those to whose benefit his admittance enures to contribute: *Jones* v. *Jones*, 5 Ha. 463; *Hudleston* v. *Whelpdale*, 9 Ha. 785.

Fines and fees, by whom payable.

In the absence of any stipulation, if the vendor has not been previously admitted, the costs and charges incurred in procuring his admission, in order

Fines, &c.

to enable him to make a surrender to the purchaser, must be paid by him; but the costs and charges of the surrender to be made by the vendor to the purchaser, are payable by the latter, as well as the fines on admittance, and the fees of the steward on the surrender and the admittance: *Drury* v. *Man*, 1 Atk. 95; but reasoning from the analogy of the payment of the costs of similar proceedings in the case of freeholds, it would appear that he ought not to have to pay the costs of the examination of a married woman who is surrendering copyholds.

The fees payable to the steward are regulated by custom.

Steward's fees.

In some manors it is a custom that the steward or his deputy shall have the exclusive right of preparing surrenders for a reasonable fee, and such a custom is good: *R.* v. *Rigge*, 2 B. & Al. 550; *Reg.* v. *Bishopstoke*, 8 Dow. P. C. 608.

The steward is not entitled to fees in respect of each tenement to which a purchaser is admitted, but only to a *quantum meruit* for his trouble: *Treherne* v. *Gardner*, 5 E. & B. 913; even though he have, at the purchaser's request, prepared a separate admittance for each tenement: *Everest* v. *Glynn*, 6 Taun. 425.

The steward may insist upon payment of all his fees and dues before accepting a surrender or granting an admittance: 48 Geo. 3, c. 149, s. 34.

Upon a conveyance to a company under the Lands Clauses Consolidation Act, 1845, s. 95, the steward is entitled only to the fees which would have been payable upon a surrender: *Cooper* v. *Norfolk Rail. Co.*, 3 Ex. 546; 6 Rail. Ca. 94.

Enfranchisement.

Either the lord or the tenant may now compel the extinguishment of manorial incidents, and the enfranchisement of land subject thereto: see sect. 7 of the Copyholds Act, 1887 (50 & 51 Vict. c. 73).

Customary Freeholds.]—The difference between copyhold estates, in the strict sense, and customary freeholds is that customary freeholds are not held "at the will of the lord" but only "according to the custom of the manor:" 2 Bl. Comm. 149; Harg. n. Co. Litt. 59 b (1). These customary freeholds are of such an amphibious nature that, as compared with

Customary Freeholds.

mere copyholds, they may be called freeholds; and when compared with absolute copyholds they may, with equal or greater propriety, be denominated copyholds; Bla. Law. Tr. 228. The general law of copyholds appears to apply to customary freeholds, except so far as it is varied by custom: *Doe* d. *Cooke* v. *Danvers*, 7 East, 299.

Freeholds of customary tenure are conveyed in various ways. In some manors they pass by deed and admittance; in others, by deed or surrender, and in others by surrender and admittance; but admittance is usually requisite, though it may be dispensed with by custom: 1 Watk. Cop. 58. In the manor of Porchester there was a custom that all deeds, feoffments, and wills of lands are void unless presented: *Peryman's Case*, Co. Litt. 49 a. In *Doe* d. *Cook* v. *Danvers*, 7 East, 299, the customary lands, parcel of the manor of Stepney, were holden according to the custom of the manor, but not at the will of the lord, and passed by surrender and admittance.

It seems to be reasonably clear that the freehold in lands of this tenure is not in the tenant but in the lord, even though the lands are not held at the will of the lord: *Stephenson* v. *Hill*, 3 Burr. 1278; *Doe* d. *Reay* v. *Huntingdon*, 4 East, 271; *Brown* v. *Rawlins*, 3 Smith, 405; 7 East, 409; *Doe* d. *Cooke* v. *Danvers*, 7 East, 299; *Burrell* v. *Dodd*, 3 Bos. & P. 378; *Thompson* v. *Hardinge*, 1 C. B. 940; *Duke of Portland* v. *Hill*, L. R. 2 Eq. 765.

Lands of this nature will be conveyed by the appropriate means, which must be ascertained in each particular case; and where a surrender is required by the custom it is essential to the conveyance, and a deed alone will be insufficient: see *Graham* v. *Jackson*, 6 Q. B. 611.

A married woman's equitable interest in customary freeholds will pass by deed acknowledged under the Fines and Recoveries Act: *Torbuck* v. *Hewitson*, 19 L. T. (O. S.) 342.

Customary freeholds are not within sect. 53 of 3 & 4 Will. 4, c. 74; and the lord cannot be compelled to enter upon the court rolls a disentailing deed relating to them: *Reg.* v. *Ingleton*, 8 Dow. P. C. 693; *Carlisle* v. *Towns*, 2 B. & Ad. 585.

CHAPTER V.

CONVEYANCES BY WAY OF SALE OF PERSONAL PROPERTY.

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Generally.

General Remarks.]—The general law as to conveyances of chattels has been already referred to, *ante*, p. 16; and reference has also been made to the different classes into which chattels are divided. It remains in this place to consider wherein the deeds used to convey chattels real and chattels personal differ from those used in transferring freehold lands. It is not proposed to deal with any of the instruments which are employed in conveying stock or shares or other property of a similar nature; for though these documents are deeds, they are drawn in stereotyped forms so as to be applicable to all circumstances, requiring merely the insertion of the names, &c., of the assignor and assignee, the amount of consideration, and other particulars.

The following points with regard to the powers of executors and administrators in respect of the personal estate of the deceased may be usefully noted here.

Assignment of leaseholds.

All the chattels, both real and personal, of a deceased person pass to his executors or administrators. No bequest or gift in the will is sufficient to oust their right; even a specific legatee can take chattels only after the assent of one or more of the executors to the bequest. The title of an executor and of an administrator accrues at different periods and in different ways. That of an executor depends upon the will alone, he is legally possessed as from the death of the testator, and before probate, for probate is only the evidence of the will: *Hensloe's Case*, 9 Rep. 38 a; *Smith* v. *Milles*, 1 T. R. 480;

Generally.

Roe d. *Bendall* v. *Sumnerset*, 2 W. Bl. 692; *Pemberton* v. *Chapman*, 7 E. & B. 218. The administrator on the other hand derives his title from the letters of administration: Shep. Touch. 474; 1 Wms. Exors. 404; and see and consider *Morgan* v. *Thomas*, 8 Exch. 302; *Doe* d. *Hornly* v. *Glenn*, 1 A. & E. 49. An executor therefore may sell before probate; and if he die before probate, the sale will be good if the probate be taken out: *Brazier* v. *Hudson*, 8 Sim. 67; but an administrator cannot sell till after the grant of the letters of administration has been made: *Morgan* v. *Thomas*, 8 Exch. 302. Any one of several executors or administrators can sell and assign the whole of the interest of his testator in any leasehold property of the latter, without the concurrence of any of his co-executors or co-administrators: *Hawkins* v. *Williams*, 10 W. R. 692; *Simpson* v. *Gutteridge*, 1 Madd. 609; *Sneesby* v. *Thorne*, 1 Jur. N. S. 536, 1058.

Assignment must be by deed.

Assignment of Leaseholds.]—It has been already noted (*ante*, p. 16), that by the Statute of Frauds (29 Car. 2, c. 3, s. 3) it was required that an assignment of a chattel real should be by deed or by note in writing, signed by the party assigning or their agents thereunto lawfully authorised; and that under the statute 8 & 9 Vict. c. 106, s. 6, an assignment of property of this nature must be by deed. Consequently, an assignment or agreement or contract to assign, not being by deed, transfers the equitable interest only, and the person claiming thereunder cannot be sued by the lessor, even though he has entered into possession: *Cox* v. *Bishop*, 8 De G. & M. & G. 815. A man may assign any property which is capable of assignment to himself and another person, under 22 & 23 Vict. c. 35, s. 21.

What amounts to an assignment.

Where a lessee transfers or makes over to a third party the whole of the term granted by the lease, the deed by which this is effected operates in law as an assignment of the term, though in such deed rent and a power of re-entry upon non-payment are reserved to the original lessee, and even though covenants are entered into by the deed which differ

Assignments of Leaseholds.

from those in the original lease: *Hicks* v. *Downing*, 1 Ld. Raym. 99; *Palmer* v. *Edwards*, 1 Doug. 187; *Thorn* v. *Woolcombe*, 3 B. & Ad. 595; *Preece* v. *Corrie*, 5 Bing. 24; *Parmenter* v. *Webber*, 8 Taun. 593; *Wollaston* v. *Hakewill*, 3 Man. & Go. 297; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; *Langford* v. *Selmes*, 3 K. & J. 220; *Beardman* v. *Wilson*, L. R. 4 C. P. 57. If a reversion of a single day be left in the grantor, it is attended with the same legal consequences as if he had retained a substantial interest: *Holford* v. *Hatch*, 1 Doug. 183. Where no reversion is retained the under-lessee is legally in the position of an assignee; he cannot be distrained upon by the mesne lessee, for the latter has no reversion, and he can sue the lessor or the assignee of the reversion, or be sued by them, directly: *Parmenter* v. *Webber*, 8 Taun. 593; *Langford* v. *Selmes*, 3 K. & J. 220; *Palmer* v. *Edwards*, 1 Doug. 187. So also, where an assignee of a term had granted a sub-lease of the whole term, it was held that he had assigned over, and was not liable to be sued by the reversioner in respect of subsequent rent or breaches of covenant: *Beardman* v. *Wilson*, L. R. 4 C. P. 57. Of course the under-lessee, in these cases, though he cannot be distrained upon by the lessee, is liable to an action on any covenant he may have entered into: *Baker* v. *Gostling*, 1 Bing. N. C. 19; *Williams* v. *Hayward*, 1 E. & E. 1040; *Re Turner*, 11 Ir. Ch. R. 304.

Frame of assignments.

In almost all particulars the frame of assignments of leaseholds is the same as that of conveyances of freeholds, and such deeds are governed by substantially the same principles. Such variations as there are arise from the different nature of the property conveyed. It is proposed briefly to indicate what these points of difference are.

Recitals and parcels.

Recitals are sometimes necessary in assignments of leaseholds. When they are employed, they will commence with the lease itself, which is recited formally and fully, the parcels being set out at length in the recital; and described in the operative part, by reference to the statement contained in the recital.

Alterations in parcels.

If the property has undergone any alterations in the interval, *e. g.*, if houses have been built upon the

Assignments of Leaseholds.

land, these facts should be cited in the following recitals; and the subsequent references to the parcels of the lease will refer also to these additional recitals; but it may be more convenient, in such cases, to omit the description of the parcels in the recitals, even though the lease be recited, and to set forth the full description of the parcels and the additions and alterations in the usual place. This must, of course, be done where the lease is not recited. If there be any dealings with the property in the interval between the granting of the original lease, and the transaction in hand, they are not recited at length, but are referred to as "divers mesne assignments and acts in the law," or as the case may be: see *ante*, p. 148.

Assignments by indorsement, &c.

Where an assignment is made by indorsement, or by supplemental deed, no recitals will be necessary, except as to events subsequent to the date of the original deed; and this mode of conveyance is frequently more suitable than that by independent deed.

Recitals may also be introduced to indicate who is the lessor, as where his consent is requisite to give validity to the assignment.

Operative words.

So far as the actual operation of the deed in respect of the transfer of the property from the assignor to the assignee, there appears to be no need for any particular operative word or phrase; but any word which will sufficiently express the intention of the parties will be adequate to effect this purpose. Nevertheless, custom has sanctioned the use of the word "assign" as suitable in deeds of this nature. Under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 7, the word "convey," when accompanied by the statutory expression denoting the character in which the assignor assigns, carries with it, by statutory implication, the covenants for title by the assignor, which are specified in sub-sect. (1) (A) and (B) of that section: see *ante*, pp. 218, *et seq.*, and *post*, p. 348. Under these circumstances, it seems probable that, in assignments of all kinds, the word "convey" will come into use as the operative word.

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Habendum.

The habendum in assignments of chattels need not contain any words limiting the estate to be taken by the assignee. A conveyance to A. B. "absolutely," or even *simpliciter*, is sufficient to vest the whole estate in him and his personal representatives, but, according to the usual practice, an assignment is expressed to be to the assignee, his executors, administrators, and assigns; and if it be desired to give the assignee less than an absolute estate, it must be done through the medium of trustees.

The habendum will express that the property is to be held by the assignee, subject to the payment of the rent reserved in the original lease, and to the performance of the covenants and conditions on the part of the lessee contained therein. The assignee of a lease is bound by such covenants in the original lease as run with the land (*a*), but he will not be liable to fulfil any of his assignor's covenants which are merely personal.

Covenants for title.

The covenants in an assignment of leaseholds are twofold—the covenants by the assignor with the assignee, and those by the assignee with the assignor.

The covenants by the assignor are those for title, which are the same in substance as those employed upon a conveyance of freeholds, with the exception that they include a covenant that the rent has been paid, and that the covenants have been duly performed: see *Church* v. *Brown*, 15 Ves. 263; *Vance* v. *Earl of Ranfurly*, 1 Ir. Ch. R. 321. In assignments drawn before the Conveyancing and Law of Property Act, 1881, these covenants were usually arranged in the following order: the covenant that the lease was good came first, then followed the covenant that the rent and covenants had been paid and performed, then that for right to assign, and, lastly, the covenants for quiet enjoyment, freedom from incumbrances, and further assurance. These covenants are all now provided for by the 7th section of the Conveyancing and Law of Property

(*a*) With respect to covenants in a lease running with the land see *ante*, Vol. III., sub tit. LEASES, pp. 228, *et seq.*

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Act, 1881; the covenants that the lease is valid, and that the rents and covenants have been paid and performed being set forth in sub-sect. (1) (B), and the remaining covenants being included in sub-sect. (1) (A).

Covenants for title.

The statutory covenants for title which are common to conveyances of freeholds and chattels real are set forth at length, *ante*, p. 218. With regard to the validity of the lease, and the payment of the rents and due performance of the covenants, the Act enacts as follows :—

"(B.) In a conveyance of leasehold property for valuable consideration other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

"That, notwithstanding anything by the person who so conveys, or anyone through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessor or grantor and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage)."

The general observations (*ante*, pp. 221, *et seq.*) with regard to the conditions under which the statutory covenants for title are implied, and the persons against whose acts and defaults they are available, apply to this covenant as well as to those which were there under consideration.

Limitation of covenant for payment and performance of rent and covenants.

The former practice with respect to this covenant varied with different conveyancers. Some usually qualified the covenant : others made it unlimited. It was, however, generally considered that as this

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covenant is only a covenant for title, it was governed by the general rule, and was limited to acts and defaults and breaches of covenant which have happened during the ownership of the vendor, and the testator or intestate, through whom he claims; see Dart V. & P. 549. This view has been adopted in framing the covenant contained in the Act, by which the assignor is made to covenant for the validity of the lease, and the payment and performance of the rent and covenants, notwithstanding anything by him "or any one through whom he derives title otherwise than by purchase for value, made, done, executed or knowingly suffered."

Assignor's covenants on sale of leaseholds in lots.

Where leaseholds are sold in lots, and the conveyance is taken by underlease, the vendor is bound, in addition to the covenants for title, to covenant with the purchaser of each portion, to pay the rent and perform the covenants reserved by, and contained in, the original lease, so far as they relate to the remainder of the property: *Brown* v. *Paull*, 2 Jur. N. S. 317. In Vol. III., *ante*, sub tit. LEASES, p. 688, it is pointed out that where the consent of the lessor can be obtained, the best course is for the vendor to surrender the original lease, and for the lessor to grant fresh leases of the several lots to the purchasers; and that where this is not possible, the whole burden of rent and covenants may be thrown upon one purchaser, and the lease may be assigned to that one purchaser, who then grants underleases (*b*).

Express covenants by assignee.

The covenants by the purchaser of leaseholds with his vendor are, as a rule, that the assignee will pay the rent and perform the covenants and conditions in the lease, and will save the vendor harmless against any breaches by him or his assigns: *Staines* v. *Morris*, 1 V. & B. 10; *Wolveridge* v. *Steward*, 1 Cr. & M. 644; *Harris* v. *Goodwyn*, 2 M. & Gr. 405; *Burnett* v. *Lynch*, 5 B. & C. 589. It must be borne in mind that an assignment of a lease

(*b*) Sometimes several assignments are made of the lots to the respective purchasers with cross powers of distress, but the course mentioned in the text seems preferable, and is frequently provided for in conditions of sale: see sub tit. CONDITIONS OF SALE, *ante*, Vol. II., p. 826.

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by the original lessee does not relieve him of his liability in respect of the express covenants in the lease, and that this remains the case, even though the lessor has accepted rent from the assignee: *Barnard* v. *Godscall*, Cro. Jac. 309; *Thursby* v. *Plant*, 1 Wms. Saund. 240. The position of the lessor may conceivably be improved by an assignment; for he is entitled to sue the lessee on his covenants, and the assignee on the ground of privity of estate. The original lessee has both privity of contract and privity of estate with the lessor: the assignee has only privity of estate. The privity of contract between lessor and lessee continues, notwithstanding that he has assigned: *Eaton* v. *Jacques*, 2 Doug. 465; *Chancellor* v. *Poole*, 2 Doug. 764; *Orgill* v. *Keamshead*, 4 Taun. 642; 1 Sm. L. C. 77.

Liability of assignor to original lessor.

The privity of estate ceases upon alienation, so that an assignee upon assigning over will cease to be liable except for any breaches which may have occurred before assigning over: *Harley* v. *King*, 5 Tyr. 692; *Taylor* v. *Shum*, 1 Bro. & P. 21; *Lekeux* v. *Nash*, 2 Stra. 1222; *Odell* v. *Wake*, 3 Camp. 394; *Onslow* v. *Corrie*, 2 Madd. 330; but he is liable for all such breaches as occur during his ownership. The right of the original lessor depends upon the privity of estate, and does not exist as against an equitable assignee: *Cox* v. *Bishop*, 8 De G. M. & G. 815; and see *ante*, Vol. III., sub tit. LEASES, pp. 151, 233.

Assignee's covenants.

Leaseholds are assigned to the assignee, subject to the payment of the rent and performance of the covenants and conditions reserved by, and contained in, the original lease. There arises in consequence an implied liability on the part of the assignee to pay the rent and perform the covenants; but notwithstanding this implied covenant, and in addition to it, even without any express stipulation, the purchaser of a leasehold estate is bound to enter into a covenant with the vendor to indemnify him against the rent and covenants of the lease: see *Pember* v. *Mathers*, 1 Br. C. C. 52; and it is immaterial whether the vendor stand in the situation of lessee or assignee; for though, in the latter case, he is only bound by the covenants during the continuance of his owner-

Purchaser of leasehold bound to indemnify vendor from the rent and covenants.

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ship, and is, therefore, discharged from his liability *to the lessor* by the assignment, yet it is probable that he has entered into a covenant with the person from whom he purchased, whether lessee or assignee, to pay the rent and perform the covenants; and against this covenant (from which he is not released by his assignment) he is entitled to an indemnity. But the covenant for indemnity can be required only where the covenantor is liable to be damnified by the non-performance of the covenants. The circumstance that the sale is made by an executor or administrator, from whom the purchaser can have no covenants of title, does not vary the rule: *Staines* v. *Morris*, 1 V. & B. 8; *Cochrane* v. *Robinson*, 11 Sim. 378. But a trustee for sale of leaseholds is not perhaps entitled to require an indemnity when the sale is not made for the benefit of the party who assigned to him; for to insist on that would be, to depreciate the property for the benefit of a stranger to the trust: see *Wilkins* v. *Fry*, 1 Mer. 265, where it was held that the assignees of a bankrupt could not insist on covenants for indemnity under 6 Geo. 4, c. 16, s. 75, which exempted a bankrupt lessee from the covenants in the lease after its acceptance by the assignees; but the Act did not exonerate a bankrupt from covenants of indemnity entered into by him as assignee of a lease: see *Maples* v. *Pepper*, 18 C. B. 177. Under the Bankruptcy Act, 1883, leaseholds of the bankrupt are absolutely divested from him, and vested in the trustee subject to disclaimer under sect. 55: *ante*, Vol. III., sub tit. Leases, p. 238. The trustee, unless he disclaims, is liable, as from his appointment to pay the rents and perform the covenants in the lease: *Ex parte Dressler*, 9 Ch. D. 252; *Titterton* v. *Cooper*, 9 Q. B. D. 473. He thus has the lease vested in him without having had to give any one a covenant to indemnify; and he, therefore, cannot, on selling, require the purchaser to give him a covenant, as he is under no liability. Purchasers of leaseholds from trustees of bankrupts have thus the advantage

Advantage of purchasing leaseholds

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from assignees in bankruptcy.

of not being obliged to indemnify their assignors; and this advantage is of no small value, not being confined to the immediate purchaser under the bankruptcy, but extends to all subsequent assignees of the lease; for, when once an assignment is made by a person who is under no liability extending beyond his ownership, of course an indemnity from the assignee cannot be required. By parity of reasoning, the latter, on his parting with *his* interest, would be in a similar situation, and thus the necessity for any further security from assignee to assignor is at an end. Different considerations, however, apply to the case of a purchase from the liquidator of a joint stock company: see *Re Russell*, *Russell* v. *Shoolbred*, 29 Ch. D. 254.

As to indemnifying assignor of lease in ordinary cases.

The indemnity which the vendor in ordinary cases is entitled to is such as will completely exonerate him from all liability for the future, after the assignee may have parted with the lease, as well as during his enjoyment: see *Lekeux* v. *Nash*, 2 Str. 1221. In the language of Lord *Thurlow*, in *Pember* v. *Mathers*, 1 Br. C. C. 52, the estate being sold out and out, the vendor expects to have no more connection with the original lessor: and see *Staines* v. *Morris*, 1 V. & B. 8. But the assignor under his covenant cannot recover any money that he has not actually had to pay, as, for instance, where a claim was made against him for damages for non-repair, which he had not in the result actually paid: *Re Russell*, *Russell* v. *Shoolbred*, 29 Ch. D. 254.

Whether leaseholds should be assigned "subject to rent and covenants."

It has been suggested that, where it is intended that the purchaser of a lease shall not incur any positive engagement to pay the rent and perform the covenants, the words "subject to the rents and covenants" should be omitted from the habendum. These words do not, however, constitute a covenant upon which the purchaser can be sued as a covenantor: *Wolveridge* v. *Steward*, 1 Cr. & M. 644; *Rowley* v. *Adams*, 4 My. & C. 540; and the phrase may be employed without any fear of subjecting the assignee to the continuing liability which he would incur if he entered into an express covenant to indemnify.

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Assignee's liability to indemnify independently of covenant.

But even where the assignee has not entered into an express covenant, he is bound to indemnify the assignor against breaches of covenant committed while the estate continues vested in him as assignee, if such be the tenour of the instrument under which his title is derived. Thus, in *Burnett* v. *Lynch*, 5 B. & C. 589, 602, the original lessee sold the property, and assigned the term by deed poll to the purchaser, subject to the payment of the rent, and performance of the covenants and conditions reserved and contained in the lease; and it was held that the vendor was entitled to recover from the purchaser a sum which the vendor, as original lessee, had been compelled to pay to the lessor, as damages for a breach of covenant committed during the purchaser's ownership. It was laid down by Lord *Tenterden*, C.J., that the defendant, by taking the estate subject to the payment of the rent and the performance of the covenants in the original lease, had thereby made it his duty to pay the rent and perform the covenants; and that on breach of that duty an action might be brought: see also *Wolveridge* v. *Steward*, 1 Cr. & M. 644; *Humble* v. *Langston*, 7 M. & W. 517. The obligation to indemnify the lessee extends to all subsequent assignees; and is not affected by the fact that the subsequent assignee may have entered into specific covenants with his immediate assignee: *Moule* v. *Garrett*, L. R. 5 Ex. 132; 7 Ex. 101. But no liability of this kind is implied where the assignment is invalid: *Couch* v. *Tregonning*, L. R. 7 Ex. 88. The assignee's liability to his assignor is the same whether the assignment to him be legal or equitable: *Beale* v. *Sanders*, 3 Bing. N. C. 850; *Close* v. *Wilberforce*, 1 Beav. 112; *Sanders* v. *Benson*, 4 Beav. 350; *Moore* v. *Grey*, 2 Ph. 717; *Rowley* v. *Adams*, 4 My. & C. 534; it extends only to acts or defaults happening during the ownership of the assignee, and ceases upon his assigning over: *Wolveridge* v. *Steward*, 1 Cr. & M. 644. The assignee cannot, by refraining from executing the assignment, or by omitting any covenant, or adding any words of limitation thereto avoid this liability to his assignor; for it is based

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upon the principle that he who takes all the benefit must have the whole burden: see *Dering* v. *Earl of Winchilsea*, 2 Bos. & P. 270.

No breach of a covenant, upon which an assignor is entitled to hold his assignee liable, can be dealt with before it has happened; and the Court has refused to make a general declaration of the assignee's liability with liberty to the assignor to apply in Chambers in respect of breaches, as and when they should occur: *Lloyd* v. *Dimmack*, 7 Ch. D. 398.

In cases in which the assignor is entitled to a covenant for indemnity, he can insist upon the express covenant, notwithstanding the implied covenant; for the liability arising out of the implied contract is confined to the period of his ownership (*b*).

The Conveyancing and Law of Property Act, 1881, makes no provision for any implied covenant upon this subject. This appears to be because the circumstances of each case vary so much that there would be great difficulty in framing any covenant to meet the different circumstances, and also because the assignor is not invariably entitled to the indemnity.

Covenants where part of leaseholds is sold.

Where part only of leaseholds is sold, the purchaser frequently takes an underlease of the part purchased by him, and so escapes any liability under the original lease. In the case of a sale of leaseholds in lots, the purchaser of the largest lot taking an assignment thereof, and granting underleases of the other lots, is bound to indemnify the other purchasers in respect of the covenants contained in the original lease relating to all portions of the property: *Brown* v. *Paull*, 2 Jur. N. S. 317 (*c*).

(*b*) See also, as to indemnity, *ante*, Vol. II., sub tit. INDEMNITY, pp. 942, 943.

Precautions where purchaser takes an underlease.

(*c*) Where the purchaser, whether upon a sale in lots or otherwise, takes instead of an absolute assignment an under-lease, it is frequently the case that he is made to covenant only to observe the covenants in the original lease so far as they relate to the part taken by him, while the mesne-lessee covenants to perform the covenants in the original lease so far as relates to the

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Liability of assignee of part of leasehold.

The assignee of part of the property comprised in a lease is liable only to a proportionate part of the rent reserved, but he is liable to an action upon the covenants in the lease; for the covenants will affect every part of the land if they run with it: *Congham* v. *King*, Cro. Car. 221; *Gamon* v. *Vernon*, 2 Lev. 231; *Stevenson* v. *Lambard*, 2 East, 576; *Twynam* v. *Pickard*, 2 B. & A. 105; *Badeley* v. *Vigurs*, 4 E. & B. 71. And the assignee of part of the land is liable to be distrained upon for rent due for the whole: *Curtis* v. *Spitty*, 1 Bing. N. C. 756; *Merceron* v. *Dowson*, 5 B. & C. 479.

It is to be noted that the liability of the assignee upon the covenants in the original lease arises from the moment of the assignment to him, whether he has or has not taken possession: *Walker* v. *Reeves*, 2 Doug. 462; *Sparkes* v. *Smith*, 2 Vern. 275; *Pilkington* v. *Shallow*, 2 Vern. 374; *Cooke* v. *Harris*, 1 Ld. Raym. 367. For this reason amongst others an underlease is preferable: *Stone* v. *Evans*,

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remainder: see *Brown* v. *Paull*, 2 Jur. (N. S.) 317. But it would seem to be simpler and less likely to lead to confusion if the underlease contained the same covenants as the superior lease, so far as regards the part of the property comprised therein; in which case the mesne-lessor's covenant of indemnity would extend to the whole of the property comprised in the original lease. If, in such a case, the mesne-lessor be careful to make the covenants in the under-lease quite co-extensive with those in the superior lease, he would, in the event of his being exposed to an action by the superior lessor, be able to recover from the sub-lessee (if in fault), as well the damages and costs recovered against him in such action as the costs of defending it: *Neale* v. *Wyllie*, 3 B. & C. 533. On the other hand, the sub-lessee should acquaint himself with the contents of the superior lease, so that he may not, through ignorance of its provisions, expose his lessor and himself to forfeiture; for he has no remedy against his lessor under the usual covenant for quiet enjoyment: *Spencer* v. *Marriott*, 1 B. & C. 457.

Where the purchaser takes a sub-lease there is no privity either of contract or estate between himself and the superior lessor; so that they cannot sue each other on the covenants in the sub-lease: *Holford* v. *Hatch*, Doug. 183. And the remedies against the sub-lessee being incident to the mesne-lessor's reversion, both of them should be careful to prevent any destruction of the mesne reversion by merger or otherwise: Co. Litt. 238 b; *Lord Treasurer* v. *Barton*, Moo. 94; *Chaworth* v. *Phillips*, Moo. 876; *Webb* v. *Russell*, 3 T. R. 393; *Stokes* v. *Russell*, 3 T. R. 678; *Allcock* v. *Moorhouse*, 9 Q. B. D. 366.

Assignments of Leaseholds.

Peake, Ad. Cas. 94; *Williams* v. *Bosanquet*, 1 Br. & B. 238; *Westerdell* v. *Dale*, 7 T. R. 312; *Copeland* v. *Stephens*, 1 B. & Al. 602; *Burton* v. *Barclay*, 7 Bing. 745.

2. Assignments of Chattels, Choses in Action, &c.

Generally.

Generally.]—The various modes in which personal chattels may be conveyed from vendor to purchaser have been referred to, *ante*, p. 16. In this place there are a few points which should be noticed with regard to the form in which deeds conveying property of this nature is dealt with.

Conveyance of chattels by deed.

Personal chattels may be transferred by deed of the usual kind. The property in the chattels passes by force of the deed itself, quite independently of any transfer of possession, for a deed in itself imparts a consideration: *Irons* v. *Smallpiece*, 2 B. & Al. 551; *Shower* v. *Pilck*, 4 Exch. 478; and the transaction, at common law, was valid, unless upon the ground of fraud or illegality: *Horsefall* v. *Key*, 2 Exch. 778; *Marsden* v. *Meadows*, 7 Q. B. D. 80. Assurances of this kind have long been styled bills of sale. Where the transfer of property is accompanied by the transfer of possession, so that all the world is aware that the chattels have passed from the vendor to the purchaser, the transaction is valid without more formalities, and a deed in usual form is sufficient to effect a conveyance: *Marples* v. *Hartley*, 1 B. & S. 1.

Object of the Bills of Sale Act.

Bills of Sale.]—No delivery being necessary to complete the transfer by deed of the property in the chattels, fraud and secret dealings with personal property are rendered possible. This evil was discussed in *Twyne's Case* (*d*), 3 Rep. 80, in which six resolutions were arrived at in which stress was laid upon the continuance of the donor in possession of the chattels comprised in the deed; and to remedy

(*d*) See the resolutions set out, *ante*, Vol. III., sub tit. Mortgages, pp. 766 *et seq.*

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the mischief Bills of Sale Acts have from time to time been passed, by which restrictions and conditions have been imposed upon deeds of this nature. At the present time absolute bills of sale are governed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which was amended, so far as regards bills of sale given as security for money, in 1882, by the Act to amend the Bills of Sale Act, 1878 (45 & 46 Vict. c. 43). Absolute bills of sale made *bonâ fide*, and not as a security for money, are within the principal Act, and must comply with its requirements, but are not governed by the Amendment Act, as they are excluded from its operation by the exception in the definition of the expression "bill of sale" in sect. 3 of the Amendment Act: see *Ex parte Izard, Re Chapple*, 23 Ch. D. at p. 413; *Swift* v. *Pannell*, 24 Ch. D. 210.

Application of the Bills of Sale Act, 1878.

The Bills of Sale Act, 1878, applies (sect. 3) to every bill of sale (a term defined by sect. 4 of the Act), whether absolute or subject or not subject to any trust, whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale. But all such deeds as are followed by delivery within seven days of actual possession of the chattels are not within the mischief of the Act, as by sect. 8 that period of time is allowed for the registration of a bill of sale: and the use, in sect. 3, of the phrase, "whereby the grantee has power to seize or take possession," seems to exclude from the Act documents employed in cases where the object and effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee: *Re Hall, Ex parte Close*, 14 Q. B. D. 386; and see *Re Cunningham & Co., Limited, Attenborough's Case*, 28 Ch. D. 682 (*e*). It is therefore to

(*e*) The *ratio decidendi* in these two cases was disapproved by the Court of Appeal in *Ex parte Parsons, Re Townsend*, 16 Q. B. D. 532; but this disapproval was explained and qualified by the same Court, differently constituted, in *Ex parte Hubbard, Re Hardwick*, 17 Q. B. D. 690.

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be borne in mind that the essence of a bill of sale is that it should be the intention, while transferring the property, not to transfer the possession immediately to the grantee, but that the grantor should retain the property more or less under his own control, or, in the phrase of the Act, that the chattels should remain in the possession or apparent possession of the grantor. A bill of sale is absolute when the immediate property in the chattels is intended to pass: see *Brantom* v. *Griffits*, 2 C. P. D. 212. See further as to what are bills of sale within the Act, *ante*, Vol. III., sub tit. MORTGAGES, pp. 792—796.

Definition of bill of sale.

The definition of a bill of sale contained in sect. 4 of the Act includes, amongst other documents, bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels; but it does not include assignments for the benefit of creditors of the person making the assignment (*e*), marriage settlements, transfers or assignments of ships or shares in ships, or documents used in the ordinary course of business as proof of the possession or control of goods, or authorising the possessor of the document to obtain possession or transfer of the goods thereby represented (*f*).

Definition of personal chattels.

Personal chattels are defined for the purposes of the Act in sect. 4 of the principal Act to mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops; but there are excepted from the term the following things: chattel interests in real estate, fixtures (except trade machinery as defined by the Act) when assigned, together with a freehold or leasehold interest in any land or building to which they are affixed; growing crops when assigned together

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(*e*) That is to say, for the benefit of the creditors generally: *General Furnishing Co.* v. *Venn*, 2 H. & C. 153; see *Wolverhampton Bank* v. *Marston*, 7 H. & N. 148.

(*f*) See *Ex parte North-Western Bank*, L. R. 15 Eq. 69; *Ex parte Conning*, L. R. 16 Eq. 414.

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with any interest in the land on which they grow; shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies; choses in action, stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of the making or giving of the bill of sale. Trade machinery is defined by sect. 5 of the Act, and the definition may be summarised as including all the machinery used in or attached to any factory or workshop, except the fixed motive power, power machinery, with their fixed appurtenances, and the fixed steam, gas, and water pipes. Any assignment or assurance of any "personal chattels," when the grantor or vendor retains the apparent possession of the property, is within the Act, and must comply with its requirements (*g*).

Apparent possession.

Though the question of apparent possession (*h*) is now of no importance as regards conditional bills of sale (see the Amendment Act, sect. 15), it is still material with regard to absolute bills of sale. By sect. 4 of the principal Act personal chattels are deemed to be in the "apparent possession" of the grantor of a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person. Something more than merely formal delivery of possession to the grantee is therefore necessary; the delivery must be such as will make it clear that the goods are in the possession of the

(*g*) For a discussion of the definition of personal chattels, and its application, see *ante*, Vol. III., tit. MORTGAGES, pp. 797, 800, where these sections are set out in full.

(*h*) With regard to apparent possession, and what constitutes it, and in what it differs from "order and disposition" under the law of bankruptcy, see *ante*, Vol. III., sub tit. MORTGAGES, pp. 803, 804.

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grantee and not of the grantor. Thus, on the one hand, where the grantor remains in occupation of the premises where the chattels are stored as tenant, but does not personally occupy them, the goods are not in his apparent possession within the Act: *Gough* v. *Everard*, 2 H. & C. 1; *Robinson* v. *Briggs*, L. R. 6 Ex. 1; while, on the other hand, where a grantor of a bill of sale of furniture remained on the premises as a servant only, and was allowed to use the furniture as part of his salary, it was held that the property was in his apparent possession: *Pickard* v. *Marriage*, 1 Ex. D. 364.

What documents are not within the Act.

Hiring agreements under which no property passes to the hirer either in equity or law are not within the Act: *Ex parte Crawcour, Re Robertson*, 9 Ch. D. 419; *Ex parte Emerson, Re Hawkins*, 20 W. R. 110. But where, after an absolute sale, a hiring agreement or other arrangement is entered into, under which the grantor remains in possession of the property, the transaction comes within the Act, and the instrument must be registered: *Phillips* v. *Gibbons*, 5 W. R. 527; *Ex parte Lovering, Re Jones*, L. R. 9 Ch. 621; *Pickard* v. *Marriage*, 1 Ex. D. 364; *Ex parte Orme, Re Lloyd*, 38 L. T. (N. S.) 328; *Ex parte Odell, Re Walden*, 10 Ch. D. 76.

After-acquired property.

After-acquired property, if sufficiently defined, may be included in an absolute bill of sale: *Holroyd* v. *Marshall*, 10 H. L. C. 191, at p. 209; *Belding* v. *Read*, 3 H. & C. 955. As to what is after-acquired property within the Act, see *Leatham* v. *Amor*, 47 L. J., Q. B. 581; *Lazarus* v. *Andrade*, 5 C. P. D. 318; *Clements* v. *Matthews*, 11 Q. B. D. 808; *Re Count D'Epineul* (2), *Tadman* v. *D'Epineul*, 20 Ch. D. 758. An assignment of future property amounts only to an agreement to assign such property when it comes into existence, and therefore, if before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's equitable interest, have become vested in another person, the latter is entitled to such chattels, and becomes the owner of them both at law and equity, and can retain them as against the prior grantee: *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Joseph* v.

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Lyons, 15 Q. B. D. 280; *Hallas* v. *Robinson*, 15 Q. B. D. 288.

Book debts (*i*) and other choses in action are not within the Bills of Sale Acts; and when they are assigned with other chattels it will generally be advisable to deal with them by a separate instrument: see *Ryall* v. *Rowles*, 1 Ves. 348; 2 Wh. & Tud. L. C. 729; and *Ex parte Fletcher*, *Re Bainbridge*, 8 Ch. D. 218.

Formalities to be observed in framing and attesting bills of sale.

An absolute bill of sale, in order that it may be valid, must comply with the formalities required by the Act of 1878. These are as follows:—Under sect. 8, it must be duly attested and registered under the Act within seven days; and it must set forth the consideration for which it was given: and under sect. 10, the attestation must be by a solicitor of the Supreme Court, and the attestation must state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor. The 15th section of the Amendment Act of 1882 repeals the 8th section of the principal Act; but it appears that this repeal only affects that section, so far as relates to the bills of sale which are within the Amendment Act: *Ex parte Izard*, *Re Chapple*, 23 Ch. D. 409; *Swift* v. *Pannell*, 24 Ch. D. 210. A similar remark applies to sect. 10 of the Amendment Act, 1882, which repeals so much of sect. 10 of the principal Act as requires that the execution of every bill of sale shall be attested (*k*) by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness.

The second sub-section of the 10th section of the principal Act also requires that the bill of sale, and every schedule and inventory annexed to or referred

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(*i*) As to what are book debts, see *McEvoy* v. *Bent*, 11 W. R. 314; *Shipley* v. *Marshall*, 14 C. B. (N. S.) 566; *Official Receiver* v. *Tailby*, 18 Q. B. D. 25.

(*k*) With regard to the attestation and registration of bills of sale, see *ante*, Vol. III., pp. 807 *et seq.*

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to in the bill, and a true copy of the bill, and of every such schedule and inventory, and of every attestation, shall be presented to the registrar, with an affidavit of the time of the making or giving the bill, of its due execution and attestation, and a description of the residence and occupation of the grantor, and of every attesting witness; and the copy of the bill and affidavit are to be filed within seven clear days after the making or giving of such bill of sale, in manner set forth in the sub-section. The sub-section is set forth at length, and its requirements are explained, *ante*, Vol. III., pp. 809, 813; but it may be noted that the affidavit need not state that the bill of sale was explained to the grantor by the attesting solicitor in pursuance of sub-sect. 1: *Re Roper, Ex parte Bolland*, 21 Ch. D. 543.

The registration of a bill of sale must be renewed at least once every five years, or it becomes void (sect. 11), but there is no need to register a transfer of a bill of sale which is already registered: see sect. 10.

Against whom irregular bill of sale invalid.

Under sect. 8 of the principal Act (which, though repealed as regards bills of sale within the Amendment Act, is still operative as regards other bills of sale: *Swift* v. *Pannell*, 24 Ch. D. 210; 31 W. R. 543), a bill of sale is void, if the formalities prescribed in the Act have not been observed, as against the persons specified in the 8th section of the Act of 1878. It is valid as against all the world, if possession be taken thereunder within seven days of its date; for the time allowed for registration is seven days, and within that time the title of the holder of the bill of sale, though unregistered, will prevail: *Marples* v. *Hartley*, 30 L. J. Q. B. 92; see *Banbury* v. *White*, 2 H. & C. 200; but the possession must be apparent as well as real: *Ex parte National Guardian Association, In re Francis*, 10 Ch. D. 408. If possession be not taken under the bill of sale, it is still valid as between grantor and grantee. In the case of *Davis* v. *Goodman*, 5 C. P. D. 128, it was held that the formalities prescribed by sect. 10 of the Act were necessary to the validity of a bill of sale as between the grantor and grantee; but

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this decision was reversed in the Court of Appeal, where it was held that a bill of sale was good as between the parties, even though it was not attested or registered as required by the Act: see *Ex parte National Mercantile Bank, Re Haynes*, 15 Ch. D. 42.

Effect of possession taken under bill of sale.

Where the grantee under an unregistered bill of sale takes possession, it will be good as against a subsequent execution creditor: *Ex parte Blaiberg, Re Toomer*, 23 Ch. D. 254; but possession taken under an unregistered bill of sale does not restore its priority over a subsequent registered bill of sale: see sect. 10 of the principal Act, and *Connelly* v. *Steer*, 7 Q. B. D. 520; *Lyons* v. *Tucker*, 7 Q. B. D. 723. It may even be doubted whether actual notice would have the effect of postponing a subsequent registered bill of sale to a prior unregistered deed: see *Edwards* v. *Edwards*, 2 Ch. D. 291.

The holder of an absolute bill of sale who has seized and sold, is not under any liability to the holder of a subsequent bill of sale, for losses on the sale: *Maugham* v. *Sharpe*, 17 C. B. (N. S.) 443.

Successive bills of sale.

Under the repealed Bills of Sale Act, 1854, the practice arose of making successive unregistered bills of sale each made within twenty-one days after the execution of the one immediately preceding, and the validity of the device as against an execution creditor was upheld by the Exchequer Chamber in *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17. This evasion of the law has been put an end to by the Act of 1878, sect. 9 (see *ante*, Vol. III., p. 804), as regards subsequent bills of sale given as *security for the same debt*, as is secured by the prior bill of sale. This expedient would, however, perhaps be valid as regards absolute bills of sale under the present law, but owing to the short interval now allowed for registration, it is not of frequent occurrence.

Choses in action.

Choses in Action.]—The methods by which choses in action are transferred have been noticed *supra*, p. 18, and discussed at length *ante*, Vol. III., sub tit. MORTGAGES, p. 775 *et seq.*; and it has been observed that it is necessary, in order to complete the title of the assignee, that notice should be given to

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the third party from whom the debt is due to the assignor. And provided such notice is duly given in writing, the assignee may now sue without the concurrence of the assignor: see sect. 25 (6) of the Judicature Act, 1873 (36 & 37 Vict. c. 66). In cases where it is likely to be impracticable or inconvenient to give such notice, it is still advisable that a power of attorney should be given to the assignee, to enable him to sue for the chose in action in the name of the assignor.

Stop order.

When the chose in action is a fund in Court, the assignee should obtain a stop order thereon: *Swayne* v. *Swayne*, 11 Beav. 463; *Todd* v. *Studholme*, 3 K. & J. 324; *Lister* v. *Tidd*, L. R. 4 Eq. 462; *Stuart* v. *Cockerell*, L. R. 8 Eq. 607; *Widgery* v. *Tepper*, 6 Ch. D. 364. When the funds which are the subject of assignment are partly in Court, partly in the hands of trustees, it is necessary to give notice to the trustees, and to obtain a stop order also; the stop order will be inoperative with regard to the funds under the control of the trustees; and the notice to the trustees will have no effect upon the funds in Court: *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686. Where a trust fund is in Court, and one incumbrancer has obtained a stop order, and the other has given notice to the trustees, the priority of the incumbrancers depends on the priority of the notice or the stop order: *Livesey* v. *Harding*, 23 Beav. 141; *Day* v. *Day*, 1 De G. & J. 144; *Pinnock* v. *Bailey*, 23 Ch. D. 497. A second incumbrancer who has taken his security with notice of the first incumbrance cannot, by obtaining a stop order, secure priority over the first incumbrancer, even though the latter never obtains a stop order: *Re Holmes*, 29 Ch. D. 786; but if the second incumbrancer had not notice of the first incumbrance, he will gain priority by obtaining a stop order: *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686.

Distringas.

When the chose in action is stock registered in the books of the Bank of England, the proper course is for the assignee to obtain an immediate transfer of it into his own name; or, if this be not possible,

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he can prevent any transfer of the fund without his knowledge by means of a notice under Ord. XLVI., having the effect of the abolished writ of distringas. This restraint can be applied to any kind of stock registered at the Bank: *Re Cross*, 1 Dr. & Sm. 580; *Etty* v. *Bridges*, 2 Y. & C. C. C. 466.

Goodwill.]—The goodwill of a trade or business comprises all the advantages which have been acquired by carrying on the trade or business, whether in connection with the premises in which it is conducted, or the names of the firm who have carried it on: *Churton* v. *Douglas*, Johns. 174.

What is goodwill.

Personal goodwill is, to all intents and purposes, the power to recommend the customers of the old business to deal with the new one: *Ex parte Thomas*, 2 M. D. & De G. 296. This power is not capable of being sold; and does not pass to a mortgagee: *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472; and does not pass to the trustee in bankruptcy: *Cruttwell* v. *Lye*, 17 Ves. 335; *Ex parte Thomas*, 2 M. D. & De G. 296; *Walker* v. *Mottram*, 19 Ch. D. 355. But though the personal goodwill may not be actually sold, and though a sale of a goodwill does not imply any covenant on the part of the vendor that he will refrain from setting up in the same trade close to his old place of business (*Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Hall* v. *Barrows*, 10 Jur. N. S. 55; *Churton* v. *Douglas*, Johns. 174), he can be prevented from doing so by making him covenant not to carry on the business within a specified distance of his old place of business, or within a fixed period from the date of the assignment. As to the validity of such covenants, see *ante*, Vol. II., sub tit. Bonds, pp. 328 *et seq.* (*l*).

(*l*) The doctrine in *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, that the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of the business has been considerably shaken. It was held in *Walker* v. *Mottram*, 19 Ch. D. 355, that it could not be extended to cases of compulsory alienation; and in *Pearson* v. *Pearson*, 27 Ch. D. 145, it was held by *Baggallay* and *Cotton*, L.JJ. (diss. *Lindley*, L.J.), that *Labouchere*

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What goodwill may be sold.

Though that goodwill which is purely personal in its nature is incapable of being sold and transferred, that which properly attaches to the place where the trade or business has been carried on, or the name under which it has been conducted, is capable of sale and transfer in the ordinary way: *Giblett* v. *Reade*, 9 Mad. 459; *Worrell* v. *Hand*, Peake N. P. C. 74; *Coslake* v. *Till*, 1 Russ. 476; *Dakin* v. *Cope*, 2 Russ. 170; *Pawsey* v. *Armstrong*, 18 Ch. D. 698; and contracts made for this purpose have been specifically enforced where the goodwill was sold in connection with the business premises: *Darbey* v. *Whittaker*, 4 Drew. 134; *Cooper* v. *Hood*, 26 Beav. 293; but where the goodwill has been sold separately the contract has not been enforced: *Baxter* v. *Conolly*, 1 J. & W. 576; *Coslake* v. *Till*, 1 Russ. 376. The goodwill, which may thus become the subject of a sale, attaches not only to ordinary trades, such as that of a public-house or ordinary mercantile business: see *Chissum* v. *Drewes*, 5 Russ. 301; *England* v. *Downs*, 6 Beav. 269; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456; *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226; *Telegraph Despatch and Intelligence Co.* v. *McLean*, L. R. 8 Ch. 658; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Ginesi* v. *Cooper and Co.*, 14 Ch. D. 596; *Leggatt* v. *Barrett*, 15 Ch. D. 306; it also attaches to professional businesses: *Bunn* v. *Guy*, 4 East, 190; *Whittaker* v. *Howe*, 3 Beav. 383; *Nickolls* v. *Stretton*, 7 Beav. 42; *Austen* v. *Boyes*, 2 De G. & J. 626; *Smale* v. *Graves*, 3 De G. & S. 706.

Frame of assignment of goodwill.

The assignment of a goodwill, with book debts, &c., in addition to the ordinary covenants for title, will contain covenants by the vendor that the book debts exist, and that he will confirm the acts of the purchaser, while the purchaser will covenant that he will pay the debts and liabilities of the old firm, and will indemnify the vendor; but these covenants are varied in nearly every case, and must be adapted to circumstances.

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v. *Dawson* was wrongly decided, and ought to be overruled; see also *Vernon* v. *Hallam*, 34 Ch. D. 748.

Frame of Deeds of Assignment of Chattels, &c.]—Where chattels are assigned by deed, by way of sale, the deed will be in the form usually employed in conveyances of freeholds so far as regards parties, recitals, statement of consideration, operative words, and parcels; the habendum will state that the parcels are to be held by the assignee absolutely, or by the assignee, his executors, administrators, and assigns, as in the case of assignments of leaseholds: *ante*, p. 347. There is no statutory form to which absolute bills of sale must conform, and they will therefore be drawn in such form as may be deemed suitable; but the formalities with regard to explanation to the grantor, attestation by a solicitor and registration prescribed by the Act must be observed: see *ante*, p. 361.

Frame of Assignments of Chattels.

Assignment by deed.

It frequently happens that it is necessary to convey sums of stock, or shares in public companies, in the same transaction and in connection with freeholds or leaseholds or other property passing by deed. In cases of this kind it is usual either for the vendor to covenant with the purchaser that he will transfer the funds in the appropriate manner, or else, to cause the necessary transfer to be made before the execution of the principal deed, and then to recite in the deed that such transfers have been made, and that the funds are vested in the purchaser in accordance with the contract. With regard to disentailing deeds of settled moneys, see *post*, sub tit. SETTLEMENTS.

Where personal chattels which will pass by delivery are sold at the same time with other property, it is usual to transfer them by the ordinary process of sale and delivery, and to make no mention of them in the conveyance of such other property.

Covenants for title.

The title to personal property is of a much simpler nature than that to real property; but this remark is specially true of the title to personal chattels. Property of this kind is in its essence incapable of being dealt with to so large an extent and in such varied ways as real property; but the title to it does sometimes, as in the case of heirlooms, or reversionary interests in stock, or settled

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moneys, depend upon wills and settlements, and other assurances; or, in the case of choses in action, the simplicity of the title may be complicated by notices of assignment, stop orders, or notices in lieu of distringas; as, for instance, in the case of *Payne* v. *Fern*, 6 Q. B. D. 620, where a sale of chattels was held void as against a prior incumbrancer. Where this is so, an abstract must be furnished in the same way as in the case of real estate.

Where personalty is assigned by deed, the grantor enters into covenants for title similar to those entered into by the grantor of freehold property. The covenants set forth in sub-sect. (1) (A) and (F) are applicable to assignments of personal chattels; for these covenants are, by the use of the proper words, implied in conveyances; and by sect. 2 (v), conveyance includes assignment and other assurance made by deed on a sale or any other dealing with or for any property; and property includes, by virtue of sect. 2 (i), real and personal property, and any estate or interest in any property, real and personal, and any debt, and anything in action, and any other right or interest. For the same reason, sub-sects. (2) and (3) will also apply to assurances of personalty. In ordinary cases, therefore, the proper covenants for title will be implied in an assurance when the grantor conveys and is expressed to convey as beneficial owner, or as trustee or mortgagee, or otherwise in accordance with the section, and with the facts: see also *ante*, p. 218, *et seq.*

CHAPTER VI.

STAMPS ON CONVEYANCES BY WAY OF SALE.

Stamps.

THE following stamp duties are imposed by the part of the schedule to the Stamp Act, 1870, dealing with conveyances or transfers :—

	£	s.	d.
"Where the amount or value of the consideration for the sale does not exceed 5*l.*	0	0	6
"Exceeds 5*l.*, and does not exceed 10*l.*	0	1	0
„ 10*l.* „ 15*l.*	0	1	6
„ 15*l.* „ 20*l.*	0	2	0
„ 20*l.* „ 25*l.*	0	2	6
„ 25*l.* „ 50*l.*	0	5	0
„ 50*l.* „ 75*l.*	0	7	6
„ 75*l.* „ 100*l.*	0	10	0
„ 100*l.* „ 125*l.*	0	12	6
„ 125*l.* „ 150*l.*	0	15	0
„ 150*l.* „ 175*l.*	0	17	6
„ 175*l.* „ 200*l.*	1	0	0
„ 200*l.* „ 225*l.*	1	2	6
„ 225*l.* „ 250*l.*	1	5	0
„ 250*l.* „ 275*l.*	1	7	6
„ 275*l.* „ 300*l.*	1	10	0
„ 300*l.*			
"For every 50*l.*, and also for any fractional part of 50*l.*, of such amount or value	0	5	0

"And see sections 70, 71, 72, 73, 74, 75, 76 and 77.

"CONVEYANCE or TRANSFER by way of security of any property (*except such stock or debenture stock or funded debt as aforesaid*), or of any security.

"See Mortgage, &c.

"CONVEYANCE or TRANSFER of any kind not hereinbefore described	0	10	0

"And see section 78."

The following sections of the Stamp Act refer to conveyances on sale :—

Interpretation of term.

Sect. 70. "The term 'conveyance on sale' includes every instrument, and every decree or order of any court or of any com-

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missioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction.

How *ad valorem* duty to be calculated in respect of stocks and securities.

Sect. 71. "(1.) Where the consideration or any part of the consideration, for a conveyance on sale, consists of any stock or marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the value of such stock or security.

"(2.) Where the consideration or any part of the consideration, for a conveyance on sale, consists of any security not being a marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security.

How consideration consisting of periodical payments to be charged (*a*).

Sect. 72. "(1.) Where the consideration or any part of the consideration, for a conveyance on sale, consists of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, such conveyance is to be charged in respect of such consideration with an *ad valorem* duty on such total amount.

"(2.) Where the consideration or any part of the consideration, for a conveyance on sale, consists of money payable periodically in perpetuity, or for any indefinite period not terminable with life, such conveyance is to be charged in respect of such consideration with *ad valorem* duty on the total amount which will or may, according to the terms of the sale, be payable during the period of twenty years next after the day of the date of such instrument.

"(3.) Where the consideration or any part of the consideration, for a conveyance on sale, consists of money payable periodically during any life or lives, such conveyance is to be charged in respect of such consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of such instrument.

"(4.) Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing such periodical payments, is to be charged with any duty whatsoever in respect of such provision, and no separate instrument made in any such case for securing such periodical payments is to be charged with any higher duty than ten shillings.

How conveyance in

Sect. 73. "Where any property is conveyed to any person in

(*a*) See as to the meaning of this section *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue*, L. R. 7 Ex. 211.

Stamps.

consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.

consideration of a debt, or subject to future payments, &c., to be charged (*b*).

Sect. 74. "(1.) Where any property has been contracted to be sold for one consideration for the whole, and is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration.

Direction as to duty in certain cases.

"(2.) Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified.

"(3.) Where a person having contracted for the purchase of any property but not having obtained a conveyance thereof contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration for the sale by the original purchaser to the sub-purchaser.

"(4.) Where a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty, in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration.

"(5.) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving

(*b*) As to the effect of this section see *Mortimore* v. *Commissioners of Inland Revenue*, 33 L. J. Ex. 263.

Stamps.

from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be exempt from the said *ad valorem* duty, and chargeable only with the duty to which it may be liable under any general description, but such last-mentioned duty shall not exceed the *ad valorem* duty.

As to the sale of an annuity or right not before in existence.

Sect. 75. "Where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for all the purposes of this Act to be deemed an instrument of conveyance on sale.

Where several instruments, the principal instrument only to be charged with *ad valorem* duty.

Sect. 76. "Where there are several instruments of conveyance for completing the purchaser's title to the property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument.

Principal instrument how to be ascertained.

Sect. 77. "(1.) In the cases below specified the principal instrument is to be ascertained in the following manner:—

"(*a.*) Where any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument:

"(*b.*) In other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in court, shall be deemed the principal instrument:

"(*c.*) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

"(2.) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

What is to be deemed a conveyance on any occasion, not being a sale or mortgage.

Sect. 78. "Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property.

"Provided that a conveyance or transfer made for effectuating

the appointment of a new trustee is not to be charged with any higher duty than ten shillings." Stamps.

Exemptions from stamp duty.

Conveyances on sale of ships and shares and interests therein are exempt from stamp duty, as also certain conveyances by or to the Commissioners of Works: see the Schedule to the Stamp Act, 1870. There are also numerous special exemptions under various statutes, relating for the most part to sales of property for public purposes.

What is a sale within the Stamp Act.

In order to render an instrument liable to stamp duty as a conveyance or transfer on sale the transaction expressed or intended to be thereby effectuated must be a *sale of property*. Thus, in *Coates* v. *Perry* (6 Moo. 188; *S. C.*, 3 Br. & B. 48), a debtor assigned certain goods and effects to trustees upon trust to sell, and out of the proceeds after payment of costs, &c., to retain the debts owing to themselves, and to apply the residue in satisfaction of debts owing to other creditors, and to hand over the surplus (if any) to the debtor; it was held that the instrument, not being a conveyance on sale, required only an ordinary deed stamp: see *Hudson* v. *Revett*, 2 Moo. & P. 663. So, also, deeds embodying family arrangements, as where a father purchases from one child a provision for another, or a relation purchases a provision for the objects of a marriage settlement, have been held not to be chargeable as sales. Thus, in *Denn* v. *Diamond*, 4 B. & C. 243, a conveyance of land by a father to his son, in consideration of natural love and affection, and of 1,500*l.* secured to be paid by the son in the augmentation of his sister's portions, was held not to require an *ad valorem* stamp. In *Massey* v. *Nanney*, 3 Bing. N. C. 478, the uncle of an intended husband, in consideration of the marriage, and of a portion paid by the bride's father, covenanted to pay an annuity to the husband and wife during their joint lives, it was held that this was not a sale of the annuity: see also *Wigmore* v. *Joyce*, 13 Ir. L. R. 164.

What is property within the Act.

The thing conveyed or transferred must be *property*. Goodwill is property within the Stamp Act, and an assignment thereof, apart from the stock in

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trade, or other property of a business, is therefore chargeable with *ad valorem* duty: *Att.-Gen.* v. *Potter*, 33 L. T. 269, overruling *Lyburn* v. *Warrington*, 1 Stack. 162. In *Warren* v. *Howe*, 2 B. & C. 281, it was held that an assignment of a judgment debt only required to be stamped as a deed not otherwise charged; but this case cannot be relied on. In *Caldwell* v. *Dawson*, 14 Jur. 316, it was decided that a policy of assurance is property within the meaning of the Act; *Rolfe*, B., in that case, intimated an opinion that an assignment of a judgment debt would be liable to *ad valorem* duty. In *Belcher* v. *Sikes*, 6 B. & C. 234, an opinion was expressed that an assignment in consideration of money on a dissolution of partnership of the retiring partner's share of the partnership debts and property was not a sale of property within the Stamp Act. But this decision may be regarded as virtually overruled: see *Christie* v. *Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Phillips* v. *Commissioners of Inland Revenue*, L. R. 2 Ex. 399. In *Potter* v. *Commissioners of Inland Revenue*, 10 Exch. 147, an assignment by deed by one partner to another of the goodwill of a trade was held to be a conveyance upon a sale of property. The rule seems to be that if a share in a business is conveyed by one partner to another in consideration of a fixed sum of money, or of an indemnity against the liabilities of the firm, the transaction will be a sale of property liable to *ad valorem* duty; but that if the partners divide between them the property of the firm in specie, the transaction will be of the nature of a partition and the instrument effecting it will be liable only to a common deed stamp, except as regards any sum of money paid by one partner to another for equality of division.

Mere contracts not charged with *ad valorem* duty.

The duty is not charged on the sale, but on the instrument of conveyance in performance of the bargain. A contract to convey is not charged; and if the purchaser can obtain the property, or the title to it, without a written assurance, or relies on his equitable title under the contract, he escapes the charge. "The *ad valorem* duty is imposed upon the

Stamps.

conveyance of an interest, not upon the right to call for such conveyance": per *Bayley*, J., in *Wilmot* v. *Wilkinson*, 6 B. & C. 506; see also *Phillips* v. *Morrison*, 12 M. & W. 740; *R.* v. *Ridgwell*, 6 B. & C. 665.

Duty regulated by expressed consideration.

The duty is charged on the expressed consideration. If all or part of the consideration is not stated, the parties are subject to heavy penalties, but the validity of the deed is not impeached: *Doe* d. *Kettle* v. *Lewis*, 10 B. & C. 673; *Att.-Gen.* v. *Brown*, 3 Exch. 662. But the purchaser may recover back any consideration money not duly stated: see *Gingell* v. *Perkins*, 4 Exch. 720.

The consideration may be apportioned in cases admitting of apportionment for the purpose of reducing the duty: see *Shepherd* v. *Hall*, 3 Camp. 180; *Hawkins* v. *Clutterbuck*, 2 Car. & K. 810. So, where freeholds or leaseholds are sold together with copyholds, inasmuch as the duty in respect of the latter is charged on the surrender, it is necessary to apportion the purchase-money for the purposes of stamp duty, and this may be done without regard to the actual relative values of the different lands. So where land and goods are purchased at a gross price, and the goods pass by delivery without assignment, the consideration may be apportioned, but of course an adequate sum must be apportioned as the consideration of the land, otherwise there would be a risk to the parties of incurring the penalties for misstatement of consideration. In the case of the purchase of properties of different tenures, or held under different titles, it was formerly possible by a judicious apportionment to effect a material saving of duty, but under the present scale of duties, such saving would generally be inconsiderable.

Confirmation of void conveyance.

A deed of confirmation endorsed on a prior deed which was intended to be a conveyance on sale, and duly stamped as such, but which had not been duly executed under a power of attorney, was held not to require an *ad valorem* stamp: *Doe* v. *Weston*, 2 Q. B. 249.

Extraneous matter.

A conveyance on sale chargeable with *ad valorem*

Stamps.

duty as such, containing a mortgage, must have stamps as on a sale and mortgage for the several sums specified; so if the deed contains any other extraneous matter not incident to the conveyance, it must have, in addition to the *ad valorem* duty on the purchase-money, a sufficient stamp to cover such matter; but where the consideration is partly valuable, and partly something else not chargeable with *ad valorem* duty, matter relating to the non-valuable consideration is not extraneous to the conveyance: see *Doe* v. *Phillipps*, 11 A. & E. 796. So also matter incidental to the sale, as an acknowledgment of right to protection of deeds, &c., will not render the conveyance liable to additional duty: see *Wolsley* v. *Cox*, 2 Q. B. 321; *Rushbrook* v. *Hood*, 5 C. B. 131.

Vesting orders.

By the stat. 15 & 16 Vict. c. 55, vesting orders under that Act, or under the Trustee Act, 1850 (13 & 14 Vict. c. 60), operating as conveyances, are subjected to the same stamp duty to which they would have been liable if they had been deeds.

Conveyances of land abroad.

It may be observed that conveyances on sale of lands in the colonies or elsewhere, if executed in the United Kingdom, are liable to stamp duty: *Wright* v. *Commissioners of Inland Revenue*, 11 Exch. 458.

PRECEDENTS.

I. *CONVEYANCE of* FREEHOLDS *by* VENDOR SEISED *in Fee Simple to a* PURCHASER *in Fee Simple, without recitals. (In note, Express Covenants for Title) (a).*

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part, WITNESSETH that, in consideration of the sum of £——, now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt (*c*), the said [*vendor*] hereby, as beneficial owner, conveys (*d*) unto the said

Parties.

Testatum.

Conveyance.

(*a*) The above precedent is the simplest form of a conveyance in fee, by a vendor who is seised in fee, and is *sui juris*. It is applicable equally where the sale is by auction as where it is by private contract. As to omitting recitals, see *ante*, p. 128. All specific reference to a written contract for sale, or to the particulars and conditions on a sale by auction, should, if possible, be avoided: see *ante*, p. 148.

As to the form in the text.

This form may be used for a conveyance by a married woman who is seised in her own right, provided she was married, or her title accrued after the commencement of the Married Women's Property Act, 1882 (44 & 45 Vict. c. 75).

(*b*) Stamp, *ad valorem* on the amount of the purchase-money. As conveyances by way of sale are generally liable only to this duty, stamp duties will not be referred to in the notes to the following precedents of "Purchase Deeds," unless such reference should be necessary, owing to the deed containing other matter in addition to the conveyance, or for other special reason.

Stamp.

(*c*) With respect to the effect of the receipt in the body of the deed, see *ante*, p. 138.

Receipt clause.

(*d*) This phrase implies the statutory covenants for title on the part of the person who conveys: these covenants are contained in sect. 7 (1) (A) of the Conveyancing and Law of Property Act, 1881, and are set out, *ante*, pp. 218, 219. A perusal of these covenants will show that they are so worded as to be suitable to all the varying states of title under which a vendor in fee may claim, whether it be by descent, devise, or purchase, in the ordinary sense. If the parties should wish not to rely upon the statutory covenants, the express covenants must be inserted; but these should be

Implied covenants for title.

I. Conveyance of Freeholds to a Purchaser without Recitals.

[*purchaser*] and his heirs ALL THAT messuage or cottage, with the garden, orchard, and close or piece of meadow or pasture land respectively adjoining thereto, situate in the parish of ——, in the county of ——, containing in the whole by admeasurement —— acres, —— roods, and —— perches, or thereabouts, and bounded on the north side thereof by the high road from [*X.*] to [*Y.*], and on the remaining sides thereof by land of the said [*vendor*] (*or as the case may be*) which premises hereby conveyed are in the occupation of [*tenant*] as tenant from year to year, TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns (*e*).

Parcels; cottage garden, &c., and close of meadow land.

Habendum.

IN WITNESS, &c.

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framed so as to suit the circumstances of the particular case: see next note.

The use of the word "grant" is not necessary to convey hereditaments, corporeal or incorporeal: see *ante*, p. 162; see also Vol. III. p. 995, note (*j*), sub tit. MORTGAGES.

Parcels.

(*e*) For other freehold parcels, see the following precedents.

General words.

As to the omission of general words and estate clause, see *ante*, pp. 184, 196. If it is intended to secure to the purchaser the grant of rights and easements, which formerly existed but which have been extinguished by unity of possession, the following words may be added at the end of the parcels (see *ante*, p. 194):

"TOGETHER with all rights, easements, and appurtenances appertaining to the premises, or any part thereof, or reputed to appertain thereto, or now or at any time heretofore demised, held, or enjoyed with, or reputed or known as part of, or appurtenant to the premises or any part thereof."

Words of limitation.

In the form of conveyance on sale given in the Fourth Schedule to the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the conveyance is expressed to be "to [*purchaser*] . . . . TO HOLD to and to the use of [*purchaser*] in fee simple." But the use of this phraseology is not obligatory, and there seems to be little advantage in substituting it for the words of limitation hitherto in use, which latter are accordingly adopted throughout these precedents.

If the conveyance is to joint tenants, say—

"Conveys unto the said [*purchasers*], and their heirs, All that [*parcels*]; TO HOLD all the premises UNTO and TO THE USE of the said [*purchasers*], their heirs and assigns.

If the conveyance is to tenants in common, say—

"TO HOLD all the premises UNTO and TO THE USE of the said [*purchasers*], and their respective heirs and assigns, as tenants in common in equal shares," *or* "in the shares following, that is to say," &c. (*specifying the several shares*).

II. *CONVEYANCE of* Freeholds *to a* Purchaser *in* Fee. Recital *of* Vendor's Seisin, &c. Release *of* Dower *by* Wife *of* Vendor (*f*). Acknowledgment *and* Undertaking *as to* Deeds.

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one [*or* first] part, [[*wife*], Parties.

The practice has become almost universal of omitting express covenants for title in reliance on the covenants implied by the statute where the vendor is expressed to "convey as beneficial owner:" see *ante*, p. 218 *et seq.* If, however, for any reason it should be desired to insert in a conveyance by way of sale of freeholds, express covenants for title, the words "as beneficial owner" will be omitted in the operative part of the deed, and the following form may be used, where the vendor himself purchased the property conveyed: Express covenants for title.

"And the said [*vendor*] hereby covenants with the said [*purchaser*] that, notwithstanding anything by him, the said [*vendor*], done, omitted, or knowingly suffered, he, the said [*vendor*], now has power to convey the premises hereby conveyed: And that the same premises, and every part thereof, shall remain and be to the use of the said [*purchaser*], his heirs and assigns, and be quietly entered upon and held and enjoyed, and the rents and profits thereof received accordingly, without any interruption or disturbance by him, the said [*vendor*], or any person claiming through or in trust for him; And that free and discharged from, or otherwise by him the said [*vendor*], his heirs, executors, or administrators, sufficiently indemified against all estates, incumbrances, claims, and demands, created or made by him, or any person claiming through or in trust for him: And further, that he the said [*vendor*], and any person having or claiming any estate, or right, or interest in the premises, or any part thereof, through or in trust for him, will, at all times, at the cost of the person or persons requiring the same, execute and do every such assurance and thing for the further or more effectually assuring the premises, or any part thereof, to the use of the said [*purchaser*], his heirs and assigns, as by him or them shall reasonably be required." Covenants: for right to convey; for quiet enjoyment; free from incumbrances; and for further assurance.

Where the vendor acquired the property by descent or devise, the above form should be modified accordingly, and the covenants extended to the acts of his ancestor and testators: see *post*, p. 381, note (*j*).

(*f*) The words in leaded brackets relate to the release of the dower. They will be necessary only in the rare cases where the Release of dower by wife.

II. Conveyance of Freeholds to a Purchaser with Recitals, Release of Dower, Acknowledgment, &c., as to Deeds.

his wife, of the second part], and [*purchaser*], of, &c., of the other [*or* third] part: WHEREAS the said [*vendor*] is seised of, or entitled to the hereditaments hereby conveyed for an estate in fee simple free from incumbrances (*g*), and has agreed to sell the same unto the said [*purchaser*] for the sum of £——; [AND WHEREAS the said [*wife*] has agreed to join in these presents, for the purpose of releasing her dower in manner hereinafter appearing;] AND WHEREAS the deeds and documents specified in the schedule hereunder written relate not only to the hereditaments hereby conveyed but also to other property of the said [*vendor*], and it has been agreed that the said [*vendor*] shall retain possession of such deeds and documents, and that he shall give the acknowledgment and undertaking hereinafter contained respectively in regard to the same. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said vendor hereby grants, and as beneficial owner conveys, [And the said [*wife*], for the purpose of extinguishing her dower, hereby releases, and by the direction of the said [*vendor*] who directs as beneficial owner (*h*) hereby conveys] unto the said [*purchaser*] and his heirs ALL THAT messuage or farmhouse, with the outbuildings and garden thereto belonging, and the several closes or pieces of land known as the —— Farm, situate, &c., containing, &c., and bounded, &c., [*as in the last Precedent*], and in the occupation of [*tenant*], as yearly tenant thereof, TO HOLD all the pre-

Recitals:
of vendor's seisin and agreement for sale;
of agreement for release of dower;
of agreement as to deeds.

Testatum.

Conveyance.

Parcels: farm.

Habendum (*i*).

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vendor was married before the 1st of January, 1834, and where the claim to dower has not been barred by the appropriate limitations, or by a jointure, or excluded by means of the assignment of an outstanding term: see *ante*, p. 119, note (*d*). Otherwise the dower being within the Dower Act will be excluded by the husband's alienation. The deed must be acknowledged by the wife, if her concurrence is necessary.

(*g*) As to recital of vendor's seisin, see *Bolton* v. *London School Board*, 7 Ch. D. 766, and see *ante*, p. 142.

(*h*) As to the covenants for title implied by this phrase, see *ante*, p. 377, note (*d*).

Limitation of Uses to bar dower.

(*i*) Where freeholds were limited to uses to bar dower (which form may still be employed, if the purchaser has a wife living to whom he was married before 1834), a "dower trustee" was made a party to the conveyance, and the *habendum* was as follows:

"TO HOLD all the premises unto the said [*trustee*] and his

mises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns (*j*): AND the said [*vendor*] hereby acknowledges the

II. Conveyance of Freeholds to a Purchaser with Recitals, Release of Dower, Acknowledgment, &c., as to Deeds.

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heirs, to such uses as the said [*purchaser*] shall by deed appoint, and in default of and subject to such appointment, to the use of the said [*purchaser*] during his life, without impeachment of waste, with remainder to the use of the said [*trustee*] during the life of the said [*purchaser*], and in trust for the said [*purchaser*] and his assigns, with remainder to the use of the said [*purchaser*], his heirs and assigns."

Acknowledgment and undertaking as to deeds.

Declaration to bar dower.

Where a purchaser desires his wife's claim to dower to be excluded, notwithstanding that he may die without having disposed of the property in his life-time and intestate, the following declaration may be inserted at the end of the conveyance:

"AND the said [*purchaser*] hereby declares that no widow of him, the said [*purchaser*], shall be entitled to dower out of the premises hereby conveyed, or any part thereof."

This declaration is not now usual, and should not be inserted in a conveyance without express instructions: see Sug. V. & P. 458.

(*j*) The following are express covenants for title by a vendor of freeholds, who derives his title by descent or devise. The words in leaded brackets are necessary only when the wife joins to release her dower:

Express covenants for title.

"And the said [*vendor*] hereby covenants with the said [*purchaser*] that, notwithstanding anything by him the said [*vendor*], or any of his ancestors or testators [or by the said [*wife*]], made, done, omitted, or knowingly suffered, he the said [*vendor*] [and the said [*wife*], or one of them], now [have *or*] has full power to convey the premises hereby conveyed in manner aforesaid: AND that the premises hereby conveyed, and every part thereof, shall remain and be to the use of the said [*purchaser*], his heirs and assigns, and be quietly entered upon and held and enjoyed, and the rents and profits thereof received accordingly, without any interruption or disturbance by him the said [*vendor*] [and the said [*wife*], or either of them], or any person claiming under or in trust for him [or them or either of them], or any of the ancestors or testators of the said [*vendor*]: AND that, free and discharged from or otherwise by him, the said [*vendor*], his heirs, executors, or administrators, sufficiently indemnified against all estates, incumbrances, claims, and demands, created or made by him the said [*vendor*] [and the said wife, or either of them], or any of the ancestors or testators of the said [*vendor*],

Covenants:

for right to convey;

for quiet enjoyment;

free from incumbrances;

II. Conveyance of Freeholds to a Purchaser with Recitals, Release of Dower, Acknowledgment, &c., as to Deeds.

right of the said [*purchaser*] to the production of the several deeds and documents specified in the schedule hereunder written and to delivery of copies thereof, and hereby undertakes for the safe custody thereof (*k*).

In witness, &c.

The Schedule above referred to.

III. *CONVEYANCE by* Heir-at-Law *of an* Intestate *to a* Purchaser *in* Fee. Release *of* Dower *by* Widow *of* Intestate (*l*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the first part; [*dowress*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part: Whereas [*ancestor*], late of, &c., deceased, being at

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and for further assurance.

or any person lawfully or equitably claiming under or in trust for him [*or* them or either of them]: And further, that he the said [*vendor*], and every person having or claiming any estate, right, or interest in the premises hereby conveyed, or any part thereof, through or in trust for him the said [*vendor*] [and the said [*wife*], or either of them], or any of the ancestors or testators of the said [*vendor*], will at all times hereafter," &c. [*Continue covenant for further assurance ut ante*, p. 379.]

(*k*) As to retainer of documents of title, see the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2. It is suggested that for the protection of the purchaser, a memorandum of this acknowledgment, &c., should be, if possible, endorsed on the last deed by which the whole property was conveyed to the vendor, or his ancestor or testator.

(*l*) The above precedent is applicable to a case where the whole of the intestate's lands are sold, as is usually the case, intestacies being more frequent among the holders of small freehold properties than among large landowners.

Where the sale is only of part of the intestate's lands, the release of dower may, it would seem, be most conveniently effected by a separate deed, dated the day before the conveyance to the purchaser, whereby the dowress will release the lands contracted to be sold from her dower in consideration of (say) a life annuity of

III. Conveyance in Fee by Heir-at-Law of Intestate—Release of Dower.

the time of his death seised of or entitled to the hereditaments hereby conveyed for an estate in fee simple, died on the —— day of —— intestate, leaving the said [*vendor*], his eldest son, and the said [*dowress*], his widow, him surviving; AND WHEREAS the said [*vendor*], has agreed to sell to the said [*purchaser*] the said hereditaments in fee simple free from incumbrances for the sum of £——; AND WHEREAS the said [*dowress*] being satisfied with the provision made for her by the said [*vendor*] in lieu and satisfaction of her dower (as she hereby acknowledges), has agreed to join in these presents for the purpose and in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreements, and in consideration of the premises, and also in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby grants, and as beneficial owner conveys, and the said [*dowress*] hereby releases, and as beneficial owner (*m*) conveys, unto the said [*purchaser*] and his heirs, ALL THAT close or parcel of land situate in the parish of ——, in the county of ——, containing by admeasurement —— acres, —— roods, and —— perches, or thereabouts, and delineated with the abuttals thereof in the plan drawn in the margin hereof (*n*), which premises were lately in the occupation of [A. B.], and are now in the occupation of [C. D.]: TO HOLD all the premises unto and to the use of the said [*purchaser*], his heirs and assigns, Freed and discharged from all dower of the said [*dowress*], and all rights, claims, and demands in respect thereof.

Recitals:

of decease of ancestor intestate, leaving son and widow surviving;

of agreement for sale;

of agreement for release of dower.

Testatum.

Parcels:

Close of land by reference to plan.

Habendum,

free from dower.

IN WITNESS, &c.

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an amount equal to one-third of the nett rents and profits of the lands sold, charged on the remainder of the estate, or otherwise sufficiently secured. The conveyance to the purchaser will then be in the ordinary form, as in Precedents I. or II., omitting from the latter the parts within leaded brackets relating to dower. See also *ante*, pp. 377, 379.

(*m*) It must be borne in mind that dower is of the nature not of a charge upon, but of a possessory interest in land: see *ante*, Vol. II. p. 694, sub tit. CONDITIONS OF SALE.

(*n*) If it is desired to dispense with a plan, the boundaries may be specified as in Precedent I., *ante*, p. 378.

IV. *CONVEYANCE of* Freeholds *in* Fee Simple *by* Appointment *under an* Express Power (*o*).

Parties. THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one part, and [*purchaser*],

Recitals: of power; of, &c., of the other part: Whereas (*p*) by an indenture dated the —— day of ——, 18—, and made between [*parties*], the hereditaments hereby appointed now stand limited to such uses as the said [*vendor*] shall by any deed or deeds appoint, and in default of such appointment to the uses therein mentioned: And whereas the said [*vendor*] has agreed to sell to the said [*purchaser*] the said hereditaments in fee simple free from incumbrances for the sum of £——: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [*vendor*] (of which sum of £—— the said [*vendor*] hereby acknowledges the receipt), he the said [*vendor*], in execution of the power reserved to him by the hereinbefore recited indenture (*q*), and of all other powers (if any) enabling him in this behalf, hereby appoints that All that messuage or dwelling-house situate on the west side of —— Street in the parish of —— in the County of Middlesex, and known as No. — in the said Street, and being the fifth house in the same street northward of —— Square, with the yard, offices, stable, coach-house, and outbuildings in rear of and belonging to the same messuage,

of agreement for sale.

Testatum.

Appointment.

Parcels: house in London.

(*o*) This form is adapted to the case of a vendor who has merely a power of appointment, and takes no estate in default of appointment. If the vendor does take any such estate the conveyance should be by both appointment and grant: see next Precedent. It is very usual to frame conveyances in the latter form, even where the vendor appears on the abstract of title to have merely a bare power, lest it should turn out that he had somehow acquired an estate in default of appointment.

(*p*) If the power is of a special and unusual character, it should be recited *verbatim*, so far as necessary to show that the formalities required are satisfied by the conveyance.

(*q*) If it be so desired, for the sake of brevity, the recitals may be omitted, and the following words substituted in the operative part for those in the text:

"in execution of a power in this behalf reserved to him by an indenture, dated, &c., and made between [*parties*], and of all other powers, &c."

shall henceforth be and remain, and he hereby as beneficial owner conveys all the same premises (*r*) To THE USE of the said [*purchaser*], his heirs and assigns.

IV. Conveyance of Freeholds by Appointment.

IN WITNESS, &c.

V. *CONVEYANCE of* FREEHOLDS *by Appointment and* GRANT *to* USES—VARIATIONS *where the* CONVEYANCE *is by Appointment and Grant to a* PURCHASER *in* FEE SIMPLE (*s*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS [*testator*], late of, &c., deceased, duly made and executed his will dated, &c., and thereby devised the hereditaments hereinafter described and hereby conveyed to such uses as the said [*vendor*] should by any deed or deeds appoint, and in default of such appointment to the uses therein mentioned, for the benefit of the said [*vendor*]: AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, which was on the —— day of ——, 18—, duly proved in the District Registry at —— of Her Majesty's High Court of Justice, Probate Division: AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of the said hereditaments hereby conveyed in fee simple free from incumbrances

Parties.

Recitals: of will;

of death of testator and probate of will;

of agreement for sale.

(*r*) The term "convey" includes "appoint" for the purposes of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41): see sect. 2 of that Act. It has been very generally assumed that, conversely, the term "appoint" will be sufficient to import the statutory covenants for title implied by sect. 7 of the Act, and accordingly it is a usual practice in a conveyance by appointment merely to say "as beneficial owner appoints," omitting the conveying clause given in the text; and it would seem that this mode of expression, though perhaps not strictly accurate, may, if desired, be followed with safety: but see *ante*, p. 222. The statutory covenant will, in the case of an appointment, necessarily include a covenant that the power is valid and subsisting: see *King* v. *Jones*, 5 Taunt. 4; see also *ante*, p. 237.

(*s*) See note (*o*) to preceding Precedent, *ante*, p. 384.

V. Conveyance of Freeholds by Appointment, and Grant to Uses.

for the sum of £——, and it has also been agreed that the same shall be conveyed in manner hereinafter appearing (*t*): NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] acknowledges the receipt, the said [*vendor*], in exercise of the said power of appointment vested in him by the said will, and of every or any other power in anywise enabling him in this behalf, hereby appoints that ALL and singular the messuage, land, and hereditaments hereinafter described and hereby granted, shall remain and be, and he hereby as beneficial owner conveys (*u*) the same premises to the uses, upon the trusts, and under and subject to the powers and provisions hereinafter declared and contained of and concerning the same.

Testatum.

Appointment.

Further *testatum.*

AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*vendor*] hereby grants and confirms, and as beneficial owner conveys (*u*) unto the said [*purchaser*] ALL and singular the messuage or dwelling-house

Grant (*x*).

Parcels.

Variation.

(*t*) If the conveyance is to a purchaser in fee simple, the last clause of this recital will be omitted.

(*u*) See *ante*, p. 385, note (*r*), the question as to who are the persons with whom the implied statutory covenants are made in the case of a "conveyance" by way of appointment to uses, is not expressly provided for in sect. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41): see *ante*, pp. 218, 229. It, however, seems that (inasmuch as by sect. 64 words in the singular are to be read as importing the plural number), the covenant must be deemed to be made directly with the several *cestuis que use*. The implied covenant in the second *testatum* will be with the grantee to uses (as is generally the case in express covenants for title), through whom the benefit of the covenants will pass to the *cestuis que use*: see *ante*, p. 281.

Variation.

(*x*) Where the conveyance is simply to a purchaser in fee, it is usual to combine the appointment and grant in one *testatum*, as follows:—

Testatum.

Appointment and grant.

"NOW THIS INDENTURE WITNESSETH that, in consideration, &c., the receipt, &c., he the said [*vendor*], in exercise, &c., hereby appoints, and by virtue of his estate and interest and by way of further assurance, hereby grants and confirms, and he also hereby, as beneficial owner, conveys unto the said [*purchaser*] and his heirs, ALL, &c. [*parcels*]; TO HOLD all the premises unto and to the use of the said [*purchaser*], his heirs and assigns. IN WITNESS, &c."

V. Conveyance of Freeholds by Appointment, and Grant to Uses.

standing and situate in —— Street, in the parish of ——, in the county of ——, and numbered —— in the said Street, and the garden and courtyard in the rear thereof thereto belonging, All which premises comprise in the whole by admeasurement —— square yards, and are more particularly delineated in the map or plan thereof drawn upon the margin of these presents, and are therein coloured red: To HOLD all the premises unto the said [*purchaser*], his heirs and assigns, to the uses, upon the trusts, and under and subject to the powers and provisions hereinafter contained, that is to say, &c. [*set out uses, trusts, powers, and provisions, according to the intention.*]

House and garden, &c., in a town.

Habendum.

IN WITNESS, &c.

VI. *COVENANT to* SURRENDER COPYHOLDS *by way of* SALE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS the [*vendor*] is seised of, or entitled to, the fee simple in possession according to the custom of the manor of ——, in the county of ——, of and in the lands and hereditaments hereinafter described and covenanted to be surrendered free from incumbrances: AND WHEREAS the said [*vendor*] has agreed to sell to the said [*purchaser*] the said hereditaments and premises for the sum of £——: NOW THIS INDENTURE WITNESSETH that, in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*] (of which sum of £—— the said [*vendor*] hereby acknowledges the receipt), the said [*vendor*] covenants with the said [*purchaser*] that he the said [*vendor*], or his heirs or assigns, and all other necessary parties (if any), will forthwith, at the cost of the said [*purchaser*] his heirs or assigns, surrender into the hands of the lord [*or* lady] of the said manor, according to the custom of the manor, and he the said [*vendor*] also hereby as beneficial owner conveys (*y*) ALL THOSE

Parties.

Recitals:

of vendor's title;

of agreement for sale.

Testatum.

Covenant to surrender copyholds.

Parcels.

(*y*) The term "convey" includes covenant to surrender copyholds, for the purposes of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), see sect. 2 (v) of that Act.

VI. Covenant to Surrender Copyholds.

several pieces or parcels of land containing in the whole by admeasurement —— acres, —— roods, and —— perches or thereabouts, and situate in the parish of ——, in the county of ——, and hereinafter particularly described, with their respective dimensions and chattels, that is to say: First, that piece of land known as the —— Close, containing, &c., and bounded on or towards the north by land of [A. B.], and on or towards the south, &c.; And, Secondly, that other piece of land with the messuage or cottage and outbuildings erected and being thereon known as ——, containing, &c., and bounded, &c., which last mentioned premises were formerly in the occupation of [C. D.], but are now in the occupation of [E. F.], be the said respective dimensions somewhat more or less, or howsoever the said respective premises may be called, known, or bounded, and to all of which premises the said [*vendor*] was admitted out of Court [*or* at a Court held for the said manor, on the —— day of ——, 18—], on the surrender of [*surrenderor*] (*z*): To THE USE of the said [*purchaser*], his heirs and assigns, according to the custom of the said manor, at by and under the accustomed rents, fines, suits, and services: AND (*a*) the said [*vendor*] hereby declares that until the hereditaments and premises hereby covenanted to be surrendered and conveyed shall be surrendered pursuant to the covenant in that behalf hereinbefore contained, he the said [*vendor*], and his heirs will stand possessed thereof in trust for the said [*purchaser*], his heirs and assigns (*b*).

Parcels.

To use of purchaser.

Declaration of trust till surrender.

IN WITNESS, &c.

VII. *SURRENDER on Sale of* COPYHOLDS.

Memorandum.

Manor of ——
in the
County of ——.

BE IT REMEMBERED that, on the —— day of, &c., [*vendor*], of, &c., one of the copyhold tenants of the said manor,

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(*z*) With respect to the descriptions of copyholds in deeds dealing therewith, see *ante*, pp. 173 and 320.

(*a*) For a discussion as to this declaration, see *ante*, p. 331.

(*b*) For express covenants for title to copyholds, see Precedent VIII., *post*, p. 390.

VII. Surrender of Copyholds.

came before [*steward*], gentleman, steward of the said manor, and in consideration of the sum of £—— to the said [*vendor*] then paid by [*purchaser*], of, &c., did out of Court surrender into the hands of the lord of the said manor by the hands and acceptance of the said steward by the rod, according to the custom of the said manor, ALL THAT [*describe the lands from the copy of Court Roll*], with the appurtenances, TO THE USE of the said [*purchaser*], his heirs and assigns, for ever, TO HOLD by copy of Court Roll, at the will of the lord, according to the custom of the said manor, and at by and under the rents and services therefor due and of right accustomed (*c*).

Surrender.

To use of purchaser

VIII. *DEED of* COVENANTS *for* TITLE *to accompany Surrender on sale of Copyholds* (*d*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS the said [*vendor*] lately agreed to sell to the said [*purchaser*] the hereditaments hereinafter recited to have been surrendered for the sum of £——; AND WHEREAS for effectuating the said sale in consideration of the sum of £—— this day paid to the said [*vendor*] by the said [*purchaser*], the said [*vendor*] has this

Parties.

Recitals: of agreement for sale;

of surrender and admittance of purchaser.

(*c*) The above precedent is here inserted, both for purposes of reference, and also in case a purchaser's solicitor should be called upon to prepare such an instrument. This is, however, very seldom the case, as surrenders are generally prepared by the stewards of the manors, and a custom that a steward shall prepare all surrenders and charge a reasonable fee therefor, is good: *R.* v. *Rigge*, 2 B. & Al. 550; *R.* v. *Bishopstoke*, 8 Dow. P. C. 608, and *ante*, p. 341. These instruments follow the form prescribed by the usage of the particular manor, and accordingly vary somewhat in phraseology.

Surrenders, by whom prepared.

(*d*) The statutory covenants for title are implied only where property is conveyed by *deed*. Unless, therefore, the surrender is preceded by a deed of covenant to surrender, in which these covenants can be incorporated by implication (see Precedent VI., *ante*, p. 387), there should be a deed to accompany the surrender, containing express covenants for title: see *ante*, p. 328.

Covenants for title to copyholds.

This deed will require a stamp of 10*s*.

Stamp.

VIII. Deed of Covenants for Title to Copyholds.

day surrendered out of Court into the hands of the lord of the manor of —— in the county of ——, by the acceptance of [*steward*], of, &c., the steward of the said manor, according to the custom thereof, ALL THAT [*describe parcels from the Court Rolls*], To the use of the said [*purchaser*], his heirs and assigns for ever; And thereupon the said [*purchaser*] has been admitted tenant of the same premises to hold the same unto the said [*purchaser*], his heirs and assigns, according to the custom of the said manor, at and under the rents fines suits and services therefor due and of right accustomed:

Testatum. NOW THIS INDENTURE WITNESSETH that, in consideration of the said sum of £—— so paid to the said [*vendor*] by the said [*purchaser*] as aforesaid, of which sum the said

Covenants for title. [*vendor*] hereby acknowledges the receipt, he the said [*vendor*] hereby covenants with the said [*purchaser*] that notwithstanding anything heretofore done, omitted, or knowingly suffered by him the said [*vendor*] [or any of his ancestors or testators], he the said [*vendor*] has good right and power to surrender all and singular the premises so surrendered as aforesaid in manner hereinbefore recited: AND that [*Covenants for quiet enjoyment, free from incumbrances, and for further assurance, ut ante*, p. 379, *note* (*e*), *or* p. 381, *note* (*k*), *substituting the word* "surrendered" *for* "conveyed" *throughout*].

IN WITNESS, &c.

IX. *ASSIGNMENT of* LEASEHOLD HOUSE, *&c., to a* PURCHASER.

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*],

Recitals: of, &c., of the other part: WHEREAS by an indenture of lease

of lease. dated the —— day of ——, 18—, and made between [*parties*],

Parcels (*e*): house with stables, gardens, &c. ALL THAT messuage or dwelling-house, with the coach-house, stables, offices, out-buildings, yard, and garden thereunto belonging, situate and being No. —— in —— Street, and on the east side thereof, in the parish of —— in the county of

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(*e*) As to description of parcels in an assignment of leaseholds, see *ante*, pp. 129 and 345.

IX. Assignment of Leaseholds.

——, and containing by admeasurement the dimensions following, that is to say, in width on the west side thereof, fronting on —— Street aforesaid, —— feet, and in rear thereof —— feet, and in depth on the north side thereof —— feet, and on the south side thereof —— feet, with the appurtenances, were demised unto the said [*lessee*], his executors, administrators, and assigns, for the term of —— years, at the yearly rent of ——, and subject to the covenants on the lessee's part and conditions therein contained (*f*): AND WHEREAS under or by virtue of certain mesne assignments and acts in the law, and ultimately by an indenture of assignment dated, &c., and made between [*parties*], the premises comprised in the hereinbefore recited indenture of lease have become, and are now vested in, the said [*vendor*] for the unexpired residue of the said term: AND WHEREAS the said [*vendor*] has agreed to sell to the said [*purchaser*] the said premises for the sum of £—— (*g*). NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], whereof the said [*vendor*] hereby acknowledges the receipt (*h*), the said [*vendor*] hereby as beneficial owner conveys unto the said [*purchaser*], ALL and singular the premises comprised in or expressed to be demised by the said hereinbefore recited indenture of lease, To

of mesne assignments;

of agreement for sale.

Testatum.

Assignment of leaseholds.

Parcels.

Habendum.

(*f*) If the lessor's consent is required, it may be given by making him a party to the assignment (as in the next precedent), or it may be given by a separate instrument, which is the more usual practice: see *ante*, Vol. III., p. 628, sub tit. LICENSES. The clause in the lease requiring the lessor's consent to assignment should be recited as follows:—

"And in the indenture now in recital was contained a covenant against assignment of the premises therein comprised, or any part thereof, without the licence in writing of the said [*lessor*], his executors, administrators, or assigns."

(*g*) If the licence to assign is given by a separate instrument, recite here:

"AND WHEREAS the said [*lessor*] has given his licence in writing to the assignment hereby intended to be made by an instrument, dated, &c."

(*h*) If there is no money payment for the assignment, say—"in consideration of the covenants by the said [*purchaser*] hereinafter contained."

IX. Assignment of Leaseholds.

HOLD all the premises unto the said [*purchaser*], his executors, administrators, and assigns, henceforth for all the residue now unexpired of the said term of —— years, SUBJECT nevertheless to the payment of the rent reserved by and the performance and observance of the covenants on the lessee's part, and conditions contained in the hereinbefore recited indenture of lease: AND the said [*purchaser*], for himself and his assigns (*j*), hereby covenants with the said [*vendor*] that he, the said [*purchaser*], his executors, administrators, or assigns, will from time to time pay the rent reserved by and perform and observe the covenants on the lessee's part and conditions contained in the hereinbefore recited indenture of lease, and will at all times hereafter keep indemnified the said [*lessor*], his heirs, executors, administrators, and assigns, from all actions, proceedings, costs, damages, expenses, claims, and demands for or in respect of non-payment of the said rent, or breach, non-performance, or non-observance of the said covenants and conditions or any of them.

Subject to payment of rent and performance of covenants, &c.

Covenant by purchaser to pay rent and perform lessee's covenants, &c., in lease (*i*).

IN WITNESS, &c.

X. *ASSIGNMENT of* LEASEHOLDS, *by* DEED ENDORSED *on the Lease, where the* LESSOR CONCURS *to give consent to the Assignment*—VARIATIONS *in Notes where the* ASSIGNMENT *is by* DEED ANNEXED *or* SUPPLEMENTAL *to the Lease.*

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN the within-named [*vendor*], of the first part; the within-named [*lessor*], of the second part; and [*purchaser*],

Recitals. of, &c., of the third part (*k*): [WHEREAS the said [*vendor*] has

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(*i*) As to the liability of an assignee of a lease to indemnify the original lessee against breaches of covenants in the lease irrespective of express covenant with the lessee, see *Moule* v. *Garrett*, L. R. 7 Ex. 101, and see *ante*, p. 350.

As one of the lessee's covenants is for payment of rent, specific mention of rent may, if desired, be omitted from this covenant.

(*j*) These words are introduced that the covenant may run with the land.

Variations. (*k*) Sometimes, instead of indorsing the assignment of the lease,

X. Assignment of Leaseholds by Endorsement, &c.

agreed to sell to the said [*purchaser*] the premises comprised in the within-written indenture for the sum of £——: AND WHEREAS the said [*lessor*] has consented to join in these presents for the purpose and in manner hereinafter appearing: NOW THIS INDENTURE] WITNESSETH, that [in pursuance of the said agreements, and] in consideration, &c., of which, &c., the said [*vendor*], with the licence and consent of the said [*lessor*] hereby testified, hereby assigns, and as beneficial owner conveys unto the said [*purchaser*], All and singular the premises comprised in, or expressed to be demised by the within-written indenture of lease, with the appurtenances, To HOLD all the premises unto the said [*purchaser*], his executors, administrators, and assigns for all the residue now unexpired of the within mentioned term of —— years [*subject to rents and covenants, &c.—Covenant by purchaser to pay rent and perform covenants, &c., as in last Precedent, mutatis mutandis*]: [PROVIDED ALWAYS, that the licence hereinbefore contained shall not be deemed to extend to or authorise any future assignment, or any underletting of the premises without the licence in writing of the said [*lessor*], his executors, administrators, or assigns.]

Testatum.

Assignment.

Habendum.

Proviso restricting licence.

IN WITNESS, &c.

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it is found more convenient to engross it on separate parchment, and to treat it as an annex or as supplemental to the lease, as to which see sect. 53 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and see *ante*, Vol. I., p. 778, note (*d*).

If the assignment is to be annexed, the parties will be referred to as "the above-named [*vendor*]," &c.

If the assignment is to be supplemental, the parties will be described as in an ordinary deed.

In either case it will be proper to add, after the names of the parties to the assignment, the following words, as the case may be:—

"AND to be read as an annex to [*or*, AND supplemental to], an indenture of lease (hereinafter referred to as the principal indenture), dated, &c."

Or, if the deed is intended to be actually annexed to the lease, the reference thereto may be to "the above-written indenture."

The proviso in brackets at the end of this Precedent may be omitted if desired, as the license will, without it, "extend only to the permission actually given": see stat. 22 & 23 Vict. c. 35, sect. 1; and see *ante*, Vol. III., p. 210.

XI. *ASSIGNMENT of* LEASE *of a* MESSUAGE *and certain scheduled* FIXTURES (*l*), *&c.*, SUBJECT *to* UNDERLEASE *of part of the Premises, in consideration of the Assignee taking upon himself the Rent and Covenants, by Endorsement.*

Parties. THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the within-named [*assignor*], of the one part, and *Testatum.* [*assignee*], of, &c., of the other part, WITNESSETH, that in consideration of the covenants on the part of the said Assignment. [*assignee*] hereinafter contained, the said [*assignor*] hereby as beneficial owner conveys (*m*) unto the said [*assignee*] ALL AND SINGULAR the messuage or tenement and premises demised by the within-written indenture of lease, with their appurtenances, and also all those the household goods, tenant's fixtures, chattels, and effects particularly mentioned in the *Habendum* as to messuage. schedule hereunder written. TO HOLD the said messuage or tenement, with the appurtenances, UNTO the said [*assignee*], his executors, administrators, and assigns, from the day of the date hereof during all the remainder now unexpired of

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As to the transfer of personal chattels. (*l*) Personal chattels pass by delivery, and a deed of assignment is not necessary to confer a title to them. The only advantage of specifying them in the present instance is, that evidence is thereby afforded of the contract between the assignor and assignee; and if a claim were set up to the fixtures by the lessor, it would be convenient for the assignee to be furnished with evidence of such contract, though, of course, it would not conclude the lessor. The covenant, as to the assignor's right to assign the fixtures, would enable the assignee to maintain an action against the assignor, in case of the property being proved to belong to any other person.

Stamp. Where a large pecuniary consideration is paid for the purchase of chattels, an objection to assigning them by deed is that the instrument is subject to an *ad valorem* duty; for it is to be observed that, where parties choose to assign, by a written instrument, any property, to the transfer of which no written instrument is necessary, the price paid must be set forth, and the duty attaches precisely in the same manner as if the instrument had been requisite to vest in the purchaser a title to the property; for, though the parties need not have had a deed at all, yet, having one, they must impress it with the proper stamp: see *Wick* v. *Hodgson*, 12 Moo. 213; 2 Scott, 249; *ante*, Vol. I., p. 390. In the present case the deed will bear a stamp of 10*s*.

(*m*) The insertion of these words seems advisable, although covenants for title are obviously less important in the case of an assignment of a lease at a rack rent than where the lease is valuable.

XI. Assignment of Lease and Fixtures Subject to Underlease by Endorsement.

the term of twenty years and one quarter of another year, wanting fourteen days, granted by the within-written indenture of lease; subject nevertheless to the payment of the rent and performance of the covenants respectively by and in the same indenture of lease reserved and contained on the lessee's part henceforth to be paid and performed; and subject also to a certain underlease of the shop and room to the rear of the same and basement, being part of the said messuage or tenement and premises, granted by the said [*assignor*] to [*underlessee*], of, &c., by an indenture, dated the —— day of —— now last past, for the term of seven years from the —— day of —— then instant, at the yearly rent of £—— (*n*). Subject to an underlease.

And to hold the said goods, tenant's fixtures, chattels, and effects, unto the said [*assignee*], his executors, administrators, and assigns absolutely, subject nevertheless to the right and interest of the said [*underlessee*] in such of the said goods, tenant's fixtures, chattels, and effects as are mentioned in a schedule written under the said indenture of lease of the —— day of —— last, And the said [*assignee*] hereby covenants with the said [*assignor*] [*covenant to pay rent and perform covenants of lease ut ante, p.* 392]. *Habendum* as to fixtures. Covenants by assignee to pay rent, &c.

In witness, &c.

The Schedule above referred to.

In the *Front Kitchen*—a leaden cistern, ball cock, with leaden sink and leaden pipe, dresser with three drawers and shelves, pantry, dresser and shelves, and about forty feet of leaden pipe. In the *Back Kitchen*—a leaden cistern, with stone sink, and water-pipe, copper, and ironing-board, &c. Schedule.

(*n*) This is the proper mode of referring to an underlease where the intention is to vest in the purchaser the benefit of the underlease. If the property comprised in the underlease be excepted (as was sometimes done) the reversion upon the underlease remains vested in the vendor; and a specification of the rent thereby reserved as part of the property sold to the purchaser would amount to a severance of the rent, and the purchaser, having no reversion, would be unable to distrain.

XII. *ASSIGNMENT of* PART *of the* PREMISES *comprised in a* LEASE (*the Remainder being Retained by the Vendor*). MUTUAL COVENANTS *by Vendor and Purchaser to* PAY *their respective* PROPORTIONS *of* RENT, *&c.;* CROSS POWERS *of* DISTRESS (*o*). ACKNOWLEDGMENT *of* RIGHT *to* PRODUCTION *and* UNDERTAKING *for* SAFE CUSTODY *of* LEASE; COVENANT *by Purchaser* NOT *to* ERECT BUILDINGS.

Parties. THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS (*recite lease of a messuage and stable, ut ante*, p. 390): AND WHEREAS the said [*purchaser*] has contracted with the said [*vendor*] for the purchase of the said stable, for the residue of the said term, at the price of £——; and upon the treaty for the said purchase it was agreed that the said [*purchaser*], his executors, administrators, and assigns should pay the yearly rent of £——, in respect of the said stable, as his proportion of the said yearly rent of £——, and that the residue of the said yearly rent of £—— should be paid by the said [*vendor*], his executors, administrators, and assigns, in respect of the said messuage and premises not hereby assigned, and that the said parties respectively should enter into the several covenants and agreements hereinafter contained. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [*vendor*], of which sum of £—— the said [*vendor*] acknowledges the receipt, the said [*vendor*] hereby as beneficial owner conveys unto the said [*purchaser*], ALL THAT the said stable hereinbefore described and comprised in and demised by the hereinbefore-recited indenture of lease, with the appurtenances, which same premises are now in the

Recitals: of lease; of contract for purchase; of agreement to apportion rent.

Testatum.

Assignment.

Parcels.

As to power of distress.

(*o*) This precedent gives short cross powers of distress, which have long been regarded as the most efficient mode of carrying into effect an arrangement of this nature; but these powers are sometimes omitted; as to the insertion of such powers, see *post*, pp. 635, *et seq.*, notes to Precedent XCI. If it be deemed advisable to insert fuller powers in the present deed, the Precedent referred to will furnish the requisite information. In the present case the assignor ought to have a counterpart.

XII. Assignment of Part of the Premises Comprised in a Lease.

occupation of the said [*purchaser*] (*p*); Together with all the benefit and advantage of the said indenture of lease, and of the lessor's covenants therein contained, so far as the same relate to or concern the said stable and premises hereby conveyed (*q*): To HOLD all the premises hereby assigned UNTO the said [*purchaser*], his executors, administrators, and assigns, henceforth, during all the remainder now unexpired of the said term —— years, subject, nevertheless, to the payment of the said yearly rent of £—— quarterly to the said [*lessor*], his heirs or assigns, on or at the days and times and in the manner on, at, and in which the whole rent reserved by the said indenture of lease is made payable; and also subject to the covenants and conditions contained in the said indenture of lease, and which, so far only as relate to the said stable and premises hereby assigned, with their appurtenances, are henceforth (*r*) to be observed and performed; [and subject also to a certain indenture of underlease, dated, &c., and made, &c., whereby a part of the premises were demised by the said [*vendor*] to [*underlessee*] for the term of —— years, from the —— day of ——, 18—, at the yearly rent of £—— (*s*);] AND the said [*vendor*], for himself and his assigns, hereby covenants with the said [*purchaser*] that he the said [*vendor*], his executors, administrators, or assigns, will or shall henceforth, and at all times hereafter (*s*) pay the said yearly rent of £—— [*vendor's proportion of rent*], so agreed to be paid by him and them in

Habendum.

Subject to proportion of rents and covenants.

Covenants by vendor:

to pay apportioned rent,

(*p*) If an underlease has been granted by the vendor, it should be noticed here, thus:

Reference to underlease.

"in the occupation of [*underlessee*] under the underlease of the same premises hereinafter mentioned."

If so mentioned, it will be excepted out of the implied covenant against incumbrances.

(*q*) If there has been an underlease, add—

"and the benefit of the underlease hereinafter mentioned."

(*r*) *Or* "from the —— day of —— last." *Or* "from the —— day of —— next."

(*s*) *Or* "from the —— day of —— next." *Or* "from the —— day of —— last, and at all times thereafter."

As to the necessity for this covenant on the part of the vendor of leaseholds, see *ante*, p. 229. The covenant that the lease is valid and that the rents have been paid, and covenants performed up to the date of the assignment, are implied by statute: see *ante*, p. 225.

XII. Assignment of Part of the Premises Comprised in a Lease.

respect of the said dwelling-house and premises not hereby assigned, and perform and observe the covenants, conditions, and agreements in the said indenture of lease contained on the part of the lessee to be performed and observed, so far only as the same relate to the same dwelling-house and premises; And also keep indemnified the said [*purchaser*], his heirs, executors, administrators, and assigns, of and from all actions, proceedings, costs, charges, damages, and expenses whatsoever, by reason of the non-payment of the said rent of £——, or the non-performance or non-observance of all or any of the covenants, conditions, and agreements contained in the said indenture of lease, so far as the same covenants, conditions, and agreements relate to or concern the said dwelling-house and premises not hereby assigned; And that it shall be lawful for the said [*purchaser*], his executors, administrators, and assigns, from time to time to enter and distrain upon the said dwelling-house and premises not hereby assigned, and thereby to reimburse himself and themselves any costs, damages, and expenses which he or they may have incurred or sustained by or on account of any such non-payment, non-performance, or non-observance as aforesaid: And the said [*vendor*] hereby acknowledges the right of the said [*purchaser*] to production of the said indenture of lease, and delivery of copies thereof, and he hereby undertakes for the safe custody thereof: And the said [*purchaser*], for himself and his assigns, hereby covenants with the said [*vendor*], in manner following (that is to say), That he the said [*purchaser*], his executors, administrators, or assigns, will henceforth (*t*) pay the said yearly rent of £——, so agreed to be paid by him and them in respect of the premises hereby assigned; And also will perform and observe the covenants, conditions, and agreements, in the said indenture of lease contained on the part of the lessee to be performed and observed, so far only as the same relate to the premises hereby assigned; And also, that the said [*purchaser*], his executors, administrators, or assigns, will keep indemnified the said [*vendor*], his heirs, executors, and administrators, from all

and indemnify purchaser therefrom.

Power of distress.

Acknowledgment and undertaking as to lease.

Covenant by the purchaser to pay and perform his proportion of the rent and covenants;

and to indemnify the vendor therefrom.

(*t*) *Or* "from the said —— day of —— last." *Or* "from the said —— day of —— next."

actions, proceedings, costs, charges, damages, and expenses whatsoever, by reason of the non-payment of the said rent of £——, or of the non-performance or non-observance of all or any of the said covenants, conditions, and agreements so far as the same relate to the premises hereby assigned; And that it shall be lawful for the said [*vendor*], &c. [*to enter and distrain upon* "the premises hereby assigned," *ut supra*]; And also that he the said [*purchaser*], his executors, administrators, or assigns will not at any time hereafter, during the residue of the said term of —— years, make, erect, or set up any buildings, wall, partitions, or other erections on the premises hereby assigned, so as to obstruct or diminish the light or air of the said dwelling-house and premises not hereby assigned, as the same light and air are now enjoyed by the occupiers thereof, or so as to raise the height or widen the ground plan of the said stable hereby assigned, or any part thereof.

XII. Assignment of Part of the Premises Comprised in a Lease.

Power of distress.

Not to erect buildings so as to obstruct the light of the assignor's dwelling-house.

In witness, &c.

XIII. *CONVEYANCE by an* Absolute Owner *to a* Purchaser *of* Freeholds, Copyholds, *and* Leaseholds.

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: Whereas the said [*vendor*] is seised of, or entitled to the several messuages, lands, and hereditaments particularly described in the first schedule hereunder written in fee simple in possession; and is also seised of, or entitled to the lands and hereditaments particularly described in the second schedule hereunder written, to him and his heirs, according to the customs of the several manors mentioned in the same schedule, whereof such last-mentioned lands and hereditaments are respectively holden, and subject to the rents and services therefor due and of right accustomed respectively; and is also possessed of, or entitled to the several messuages and lands particularly described in the third schedule hereunder written, for the residues of the several terms therein respectively created by the several leases, which, and the mesne assignments whereof respectively are also mentioned in such last-mentioned schedule, and are therein set

Parties.

Recitals:

of vendor's title;

to freeholds;

to copyholds;

to leaseholds;

XIII. Conveyance of Freeholds, Copyholds, and Leaseholds.

of agreement for sale.

opposite to the properties to which such leases and assignments relate respectively, and at the yearly rents therein mentioned respectively: AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of all the said messuages, lands, and hereditaments, at the price of £——: NOW THIS INDENTURE WITNESSETH, that

Testatum.

in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] acknowledges the receipt, the said [*vendor*] hereby grants, and as

Grant of freeholds.

beneficial owner conveys, unto the said [*purchaser*] and his heirs, ALL THAT and those the mansion-house called —— Hall,

Parcels.

with the gardens, pleasure grounds, and park thereto belonging, and the several messuages or dwelling-houses, lands and hereditaments situate in the parishes of —— and ——, in the county of ——, and particularly described in the first schedule hereunder written, and delineated with the abuttals thereof in the map or plan drawn on the —— skin of these presents, and therein coloured ——: TO HOLD all the premises hereby granted UNTO AND TO THE USE of the said

Second *testatum.*

[*purchaser*], his heirs and assigns: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid (*u*),

Covenant to surrender copyholds.

the said [*vendor*] hereby covenants with the said [*purchaser*] that he the said [*vendor*], or his heirs, will forthwith, at the cost of the said [*purchaser*] his heirs or assigns, surrender into the hands of the several lords or ladies of the manors of which the same are respectively holden, and according to the several customs of such manors respectively, And he also hereby as beneficial owner,

Parcels.

conveys ALL those messuages, lands, and hereditaments situate in the parishes of —— and —— aforesaid, and particularly described in the second schedule hereunder written and delineated, with the abuttals thereof, in the said map or plan, and therein coloured ——: TO THE USE of the said [*purchaser*], his heirs and assigns, according to the several customs of the said manors, and at and under the several rents, fines, suits, and services therefor due and of right

(*u*) With respect to this mode of referring to the consideration, where the price is (as is usually the case) not apportioned between the lands of the several tenures, see *ante*, p. 155.

XIII. Conveyance of Freeholds, Copyholds, and Leaseholds.

accustomed respectively [*Declaration of trust ut ante*, p. 388]. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*vendor*] hereby assigns, and as beneficial owner conveys unto the said [*purchaser*], ALL THOSE the several messuages and pieces or parcels of land situate in the parishes of —— and —— aforesaid, particularly described in the third schedule hereunder written and delineated, with the abuttals thereof, in the said map or plan, and therein coloured ——, TO HOLD all the premises hereby assigned UNTO the said [*purchaser*], his executors, administrators, and assigns, for the residues of the several terms therein respectively created by the several indentures of lease, which in the said third schedule hereunder written are respectively set opposite to the properties to which the same respectively relate, subject to the several rents and covenants on the part of the lessees, and to the conditions reserved by and contained in the said leases respectively: AND the said [*purchaser*] hereby, for himself and his assigns, covenants with the said [*vendor*] that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will from time to time pay the respective rents reserved by, and perform and observe the respective covenants on the part of the respective lessees and conditions contained in the said several indentures of lease, and will at all times hereafter keep indemnified the said [*vendor*], his heirs, executors, administrators, and assigns, from and against all actions, proceedings, costs, damages, expenses, claims, and demands, for or in respect of non-payment of the said respective rents, or breach, non-performance, or non-observance of the said respective covenants and conditions, or any of them.

Third *testatum*.

Assignment of leaseholds.

Covenant by purchaser to pay rents.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

THE THIRD SCHEDULE ABOVE REFERRED TO.

XIV. *CONVEYANCE of an* ESTATE *for* LIFE *in* FREEHOLDS *to a* PURCHASER. VARIATIONS *where the* CONVEYANCE *is by* DEMISE (*x*).

Parties. THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*],

Recitals: of, &c., of the other part: WHEREAS, under or by virtue of an

of settlement; indenture of settlement dated, &c., and made between [*father*] (the father of the said [*vendor*] of the first part), now deceased, of the first part; the said [*vendor*], of the second part; [*wife*], by her then name and description of [*wife's maiden name*], spinster, of the third part; and other persons, of the remaining parts (*y*) (being the settlement made on the marriage of the said [*vendor*] with the said [*wife*], his wife), the hereditaments hereinafter described and hereby conveyed [*or* demised] now stand limited to the use of the said [*vendor*] and his assigns for his life without impeachment of waste,

of agreement for sale. with remainders over: AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of the said hereditaments for the [term of 100 years, determinable with the] life of the said [*vendor*], for the sum of £——.

Testatum. NOW THIS INDENTURE WITNESSETH that, in pur-

Conveyance [or demise] of life estate. suance of the said agreement and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said

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(*x*) It was formerly the general practice that conveyances of life estates should be made in the form of demises for a term of years, determinable on the death of the tenant for life, and this practice is still frequently adopted. The reversion was left in the vendor for the purpose of preserving his powers of leasing, &c., under the settlement or will; but this reason for adhering to the old form of conveyance has lost its former importance in this respect: see *Long* v. *Rankin*, Sug. Pow. App. 895; *Alexander* v. *Mills*, L. R. 6 Ch. 124. The exercise of his powers by the tenant for life must not, however, be to the prejudice of the purchaser of the life estate: see *Noel* v. *Lord Henley*, M'Cl. & Y. 302; see also *ante*, Vol. III., pp. 721 *et seq.* And now, notwithstanding the sale of the life estate, the statutory powers of leasing, &c., will continue to be exercisable by the tenant for life, with the consent of the purchaser. Any contract by the "tenant for life" not to exercise his statutory powers is void, but such powers must not be exercised so as to prejudice an assignee for value without his consent: see the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 50.

(*y*) Where the recited deed has numerous parties, most of whom are joined for purposes extraneous to the object of the recital, it may be convenient to refer to them in this manner.

[*vendor*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby [demises, and], as beneficial owner, conveys unto the said [*purchaser*] ALL THOSE several manors or reputed manors, &c. [*describe parcels*]: TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs or assigns, [*or*, UNTO the said [*purchaser*], his executors, administrators, and assigns], henceforth for all the remainder of the life of the said [*vendor*], [*or* for the term of 100 years if the said [*vendor*] shall so long live], without impeachment of waste (*z*).

XIV. Conveyance of Life-Estate in Freeholds.

Habendum.

IN WITNESS, &c.

XV. *SURRENDER of an* ESTATE FOR LIFE *in Possession in* FREEHOLDS *to a* REMAINDERMAN. VARIATION *where there are limitations to* TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*tenant for life*], of, &c., of the one part, and [*remainderman*], of, &c., of the other part (*a*); WHEREAS

(*z*) The conveyance of a life estate by the tenant for life confers on the purchaser an estate *pur autre vie*. Formerly, if the grant was to the purchaser *simpliciter*, the grantor was not allowed to re-enter on the grantee's death, but any person might enter and retain possession of the land as general occupant during the remainder of the grantor's life: see Co. Lit.; if, however, the grant was to the grantee and his heirs, the heir would be entitled on the grantee's death as special occupant: *Atkinson* v. *Baker*, 4 T. R. 229. An estate *pur autre vie* is now capable of devise; and a grant thereof may be made with a *habendum* to the use either of the grantee and his heirs and assigns, or of the grantee and his executors, administrators, and assigns (or *simpliciter*, which amounts to the same thing). In the former case (in the absence of a devise) the heir will take, as formerly, as special occupant, but the land in his hands will be chargeable as assets by descent; in the latter, the property will go to the executors or administrators of the grantee, and be assets in their hands distributable as personal estate: see the Wills Act (1 Vict. c. 26), sects. 3, 6.

Estates *pur autre vie.*

(*a*) If the will or settlement is drawn in the form necessary

XV. Surrender of Life Estate in Freeholds to Remainderman.

[*Recite will or settlement, whereby the hereditaments dealt with were devised to or settled to use of tenant for life, with remainder to the child or children of* A. *in fee; and* (*if the case be so*) *death of testator without revoking or altering will; probate of will; and that remainderman was the only child of* A., *who was dead*]: AND WHEREAS the said [*remainderman*] has contracted with the said [*tenant for life*] for the purchase of his estate for life in the hereditaments hereinafter surrendered, at the price of £—— (*b*). NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*remainderman*] to the said [*tenant for life*], of which sum of £—— the said [*tenant for life*] hereby acknowledges the receipt, the said [*tenant for life*] (*c*) hereby surrenders, and, as beneficial owner, conveys unto the said [*remainderman*], ALL THAT [*parcels*]: TO HOLD all the premises UNTO AND TO THE USE of the said [*remainderman*], his heirs and assigns, during the life of the said [*tenant for life*]: To the intent that the estate of the said [*tenant for life*] (*d*) may be merged and extinguished in the ultimate remainder and inheritance in fee of the premises hereby surrendered.

Contract for purchase.

Testatum.

Surrender.

Parcels.

IN WITNESS, &c.

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before the Statute 8 & 9 Vict. c. 106, by which the necessity for the limitation of the estate to trustees to preserve contingent estates was done away with (see sect. 8 of that Act), the trustees to preserve must be made parties of the second part; and the recital will, of course, set forth the limitation to them after the life estate.

They must join in the conveyance to surrender their estate, otherwise the life estate will be prevented by their outstanding estate from merging in the estate in remainder. In such case the parties will be :—

"[*tenant for life*]; of ——, of the first part; [*trustees to preserve*], of ——, of the second part; and [*remainderman*], of ——, of the third part."

(*b*) "and the [*trustees*] have, at the request of the [*tenant for life*] and [*remainderman*], agreed to join in surrendering the same hereditaments, in manner hereinafter appearing."

(*c*) "the said [*trustees*] hereby surrender, and, as trustees, convey, and the said [*tenant for life*], &c.

(*d*) "the several estates of the said [*trustees*] and [*tenant for life*] respectively may, &c."

XVI. *CONVEYANCE by* Coparceners *to a* Purchaser, *one of the Coparceners being a Married Woman* (*e*).

THIS INDENTURE, made the —— day of ——, 18—, Between [*first coparcener*], the wife of [*husband*], of, &c., and the said [*husband*] (*f*), of the first part; [*other coparcener*], of, &c., spinster, of the second part; and [*purchaser*], of, &c., of the third part: Whereas [*ancestor*], late of, &c., being seised of or entitled to the lands and hereditaments hereinafter described and hereby conveyed, died on the —— day of ——, 18—, intestate, leaving the said [*coparceners*] his only children him surviving; And whereas the said [*coparceners*] have agreed with the said [*purchaser*] for the sale to him of the said lands and hereditaments in fee simple in possession, free from incumbrances, at the price of £——: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— (*one-half of the purchase money*) now paid to the said [*first coparcener*] and [*husband*] by the said [*purchaser*], of which sum of £—— the said [*first coparcener*] and [*husband*] hereby acknowledge the receipt, and of the sum of £—— (*remainder of the purchase money*) now paid to the said [*other coparcener*] by the said [*purchaser*], of which sum of £—— the said [*other coparcener*] hereby acknowledges the receipt, they the said [*first coparcener*], [*husband*], and [*other coparcener*] hereby as beneficial owners convey, and each of them as beneficial owner conveys (*g*)

Parties.

Recitals: of title of vendors;

of agreement for sale.

Testatum.

(*e*) As to sales by co-partners, see *ante*, p. 30.

(*f*) If the married woman was married after the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), or if her title to the property accrued after that date, her husband will not be a necessary party to the conveyance: see *ante*, p. 72. For other forms of conveyances on sales by married women, see *post*, Precedents XLIII., XLIV., *post*, pp. 473, 475.

(*g*) The implied covenants for title will be joint and several: see *ante*, p. 213. As to the covenant by the husband in this case, see *ante*, p. 220, from which it appears that the proper mode of framing a conveyance by the husband and wife of the wife's property, not belonging to her to her separate use, is to make the husband and wife convey as beneficial owners simply, and not to make the wife convey at her husband's direction.

XVI. Conveyance in Fee by Co-parceners.

unto the said [*purchaser*] and his heirs, ALL THAT [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns.

IN WITNESS, &c.

XVII. *CONVEYANCE by* TENANTS IN COMMON *holding under different Titles to a* PURCHASER *in* FEE SIMPLE.

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN [*first tenant in common*], of, &c., of the first part; [*second tenant in common*], of, &c., of the second part; and

Recitals: [*purchaser*], of, &c., of the third part: WHEREAS (*h*) [*testator*],

of will; late of, &c., deceased, made his will dated, &c., and thereby devised the lands and hereditaments hereinafter described and hereby conveyed by the description of "my house and garden in —— and the two fields adjoining," to his sons [A. B.] and

of codicil; [*first tenant in common*] in equal moieties: AND WHEREAS the said [*testator*] made a codicil dated, &c., to his said will, but did not thereby revoke or alter his said will so far as the same is hereinbefore recited: AND WHEREAS the said [*testator*]

of death of testator; died on the —— day of ——, 18—, without having revoked or altered his said will, save by the said codicil, and the same will with the said codicil thereto was duly proved on the —— day of ——, 18—, by the executors therein named in the Principal Registry of Her Majesty's Court of Probate: AND WHEREAS,

of conveyance of moiety of property; by an indenture dated, &c., and made between the said [*son*], of the one part, and the said [*second tenant in common*], of the other part, the said [*son*] granted unto the said [*second tenant in common*] the said moiety of and in the said lands and hereditaments so devised to him as aforesaid, to hold unto and to the use of the said [*second tenant in common*],

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(*h*) It is convenient, where possible, to carry back the recitals of the title to the last point at which the whole property was held by the same person. When this cannot be done, it is perhaps best simply to recite the seisin of each tenant in common at the date of the conveyance.

XVII. Conveyance in Fee by Tenants in Common.

his heirs and assigns: AND WHEREAS the said [*purchaser*] has agreed with the said [*first tenant in common*] for the purchase of the fee simple, free from incumbrances, of the said moiety of the said lands and hereditaments so devised to him as aforesaid, at the price of £750, and the said [*purchaser*] has agreed with the said [*second tenant in common*] for the purchase of the fee simple, free from incumbrances, of the said moiety of the said lands and hereditaments so vested in him as aforesaid, at the price of £800: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreements, and in consideration of the sum of £750 now paid to the said [*first tenant in common*] by the said [*purchaser*], of which sum of £750 the said [*first tenant in common*] hereby acknowledges the receipt, and in consideration of the sum of £800 now paid to the said [*second tenant in common*] by the said [*purchaser*], of which sum of £800 the said [*second tenant in common*] acknowledges the receipt, the said [*first tenant in common*], as to one moiety of the said lands and hereditaments, hereby as beneficial owner conveys (*i*), and the said [*second tenant in common*], as to the remaining moiety of the said lands and hereditaments, hereby as beneficial owner conveys unto the said [*purchaser*], ALL THAT the messuage, dwelling-house or tenement, stables, and coach-house and yard, and the garden and the two fields or closes, or parcels of pasture land thereto adjoining, situate and being on the north side of —— Street, in ——, in the County of ——, which house is commonly known as —— House, and all which messuage, lands, and hereditaments contain by admeasurement —— acres, —— roods, and —— perches, or thereabouts, and are more particularly delineated in the plan thereof, &c., TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns.

of agreement for sale.

Testatum.

Parcels: dwelling-house, &c.

IN WITNESS, &c.

(*i*) Each of the conveying parties being expressed to convey one moiety only, his implied covenants for title will extend only to so much of the property: see *ante*, p. 213.

XVIII. *CONVEYANCE by* PARTNERS *of* FREEHOLDS *held by them as* PARTNERSHIP PROPERTY *to a Purchaser.*

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*surviving partner*], of, &c., and [*other surviving partner*], of, &c., of the first part; [*executor of deceased partner*] (*k*), of, &c., of the second part; and [*purchaser*] of the third part:

Recitals: of partnership;

WHEREAS the said [*surviving partners*] and [*deceased partner*], late of, &c., carried on the business of merchants in the City of London in copartnership on the terms that the said [*surviving partners*] should be entitled to two-third parts of the assets of the said business, and the said [*deceased partner*] should be entitled to the remaining third part of such assets;

of purchase of lands for partnership purposes;

AND WHEREAS the said [*partners*] purchased for purposes of their said business the hereditaments hereby conveyed, and by an indenture dated, &c., and made between [*parties*], the said hereditaments are granted or assured to the use of [*partners*], their heirs and assigns, as joint tenants in trust for the said [*partners*], their executors, administrators, and assigns, as part of their partnership estate and property;

of will of deceased partner;

AND WHEREAS the said [*deceased partner*] duly made his will, dated, &c., and thereby appointed the said [*executor*] to be his sole executor;

of agreement for sale.

AND WHEREAS [*recite death and probate of will*]; AND WHEREAS the said [*surviving partners*] and [*executor*] have agreed with the said [*pur-*

Conveyances of land by partners.

(*k*) The question, who are the proper conveying parties on a sale of partnership property, will depend on the form of the original conveyance on the purchase thereof by the firm. In the present case, the original conveyance is taken to have been according to a form, not unfrequently in use, whereby the property was conveyed to all the partners in fee, in trust for the partners, their executors, administrators, and assigns, as part of the partnership estate, without any proviso as to survivorship: see next Precedent, and n. (*l*), *post*, p. 409. The surviving partners having therefore of themselves (in the absence of stipulation) no power to bind the executors of the deceased partners by deed (see Vol. IV., p. 250 *et seq.* tit. PARTNERSHIPS), the concurrence of the latter is here necessary.

When real estate is held by partners in joint tenancy simply, as part of their partnership assets, the legal estate vests solely in the surviving partners, but they are trustees for the deceased partner of the share therein of such deceased partner: see *Davies* v. *Games*, 12 Ch. D. 813; and *ante*, Vol. IV., pp. 280 *et seq.* sub tit. PARTNERSHIPS.

chaser] for the sale to him of the said hereditaments at the price of £6000. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £4000 now paid to the said [*surviving partners*] by the said [*purchaser*], and of the sum of £2000 now paid to the said [*executor*] by the said [*purchaser*], making together the sum of £6000, of which several sums of £4000 and £2000 the said [*surviving partners*] and the said [*executor*] respectively acknowledge the receipt, the said [*surviving partners*] as beneficial owners convey, and the said [*executor*] hereby confirm, and as such legal representatives of the said [*testator*] deceased as aforesaid convey unto the said [*purchaser*], ALL THAT [*describe parcels*], TO HOLD all the premises UNTO and TO THE USE of the said [*purchaser*], his heirs and assigns.

XVIII. Conveyance of Freeholds Belonging to a Partnership Firm.

Testatum.

IN WITNESS, &c.

XIX. *CONVEYANCE of* FREEHOLDS *to* PARTNERS *as* JOINT TENANTS (*l*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*partner*], of,

Parties.

(*l*) Where a firm purchases land for the purposes of the partnership business, the mode of conveyance to be adopted will require consideration with regard to the circumstances of the particular case.

Conveyances of land to partners.

Sometimes, the conveyance is made to the partners in fee as tenants in common simply, with the object of avoiding any reference which could disclose the fact that the property is bought for partnership purposes; but, if this course is adopted, then, in case of the death of a partner, the concurrence of his heir-at-law or devisee will be necessary on a re-sale, in order effectually to convey the property to a purchaser, which may cause some inconvenience; for, if the partner died intestate, the concurrence of the heir-at-law, who may have no beneficial interest in the property, may not be easily obtainable; and, on the other hand, if the partner's share passed by devise, his will may probably contain such reference to the partnership as will necessarily put the articles of partnership (if any) on the title to the land.

The form of conveyance given in this precedent is that now generally employed on a purchase of land for partnership purposes. Its simplicity and conciseness render it particularly well adapted for use in the case of a partnership formed to purchase land as a

XIX. Conveyance of Freeholds to Partners as Joint Tenants.

Testatum.

&c., [*second partner*] of, &c., and [*third partner*], of, &c., carrying on the business of —— at ——, in the county of ——, in partnership under the style or firm of [A. & Co.] of the other part, WITNESSETH that, in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*partners*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby as beneficial owner conveys unto the said [*partners*] and their heirs, ALL, &c. [*describe parcels*], TO HOLD all the premises UNTO and TO THE USE OF the said [*partners*], their heirs and assigns, as joint tenants, IN TRUST for the said [*partners*], their executors, administrators, and assigns, as part of the estate and joint stock of their said partnership: PROVIDED ALWAYS, and it is hereby agreed and declared, that in case of the death of any or either of the said [*partners*], then the survivors or survivor of them, or the executors or administrators of such survivor, shall have full power, without the concurrence of the executors or administrators of the partners or partner so dying, to sell, mortgage, charge, lease, or otherwise dispose of the premises hereby conveyed or any of them, and to receive and give effectual receipts or discharges for any moneys payable under or by virtue of any such disposition, and that every such disposition and receipt shall effectually and absolutely bind all persons having or claiming any estate or interest of or in the property of the partnership, and exonerate all persons paying any such moneys as aforesaid from seeing to the application or being answerable for any loss or misapplication thereof (*m*).

Proviso that surviving partners may dispose of the property, and give effectual receipts.

IN WITNESS, &c.

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speculation for the purposes of re-sale. The proviso at the end of the form (which may of course be omitted, if desired) does away with difficulties which might arise as to obtaining the concurrence of the legal representatives of a deceased partner: see Precedent XVIII., *ante*, p. 408.

(*m*) The concluding words of this proviso are not strictly necessary, the receipt of a surviving partner being generally a good discharge for a payment to the firm: *Brazier* v. *Hudson*, 9 Sim. 1; *Philips* v. *Philips*, 3 Ha. 281; and see also as to the general power of trustees to give receipts sect. 36 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). As to the power of one partner to bind another, or his representatives, by sale, mortgage, lease, or other disposition by deed, see *ante*, Vol. IV., pp. 250 *et seq.* tit. PARTNERSHIPS.

This power is properly given to the personal representatives of the last surviving trustee, on whom the legal estate in the land will devolve: see *ante*, p. 33.

XX. *CONVEYANCE of* FREEHOLDS *and* LEASEHOLDS *to a* TRUSTEE *on a Purchase by a* PARTNERSHIP FIRM (*n*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the first part; [*purchasers*], co-partners carrying on the business of ——, at ——, in the county of ——, under the firm or style of [A. & Co.], of the second part; and [*trustee*], of, &c., of the third part: WHEREAS, by an indenture dated the —— day of ——, in the fourth year of the reign of King James the First, made between [*lessor*], then lord of the manor of ——, in the county of —— aforesaid, of the one part, and [*lessee*], of the other part, for the consideration therein mentioned, the said [*lessor*] did demise, grant, and to farm let unto the said [*lessee*], his executors, administrators, and assigns, the hereditaments hereinafter described and hereby assigned by their then description of ALL, &c. [*describe parcels from lease*], to hold unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— then last, for the term of 500 years, without impeachment of waste, at the yearly rent of one peppercorn if demanded; AND WHEREAS by divers mesne assignments and acts in the law the said leasehold premises became vested in [*late owner*], deceased, for all the residue of the said term of 500 years; AND WHEREAS the said [*late owner*] duly made and executed his will, dated, &c., and thereby bequeathed all his personal estate whatsoever to the said [*vendor*], and appointed him executor of his said will; AND WHEREAS the said [*late owner*] died on the —— day of ——, 18—, without having revoked or altered his said will, which was on the —— day of ——, 18—, duly proved in the District Registry at ——, of Her Majesty's High Court of Justice, Probate Division, by the said [*vendor*]; AND WHEREAS

Parties.

Recitals: of lease for long term of years at peppercorn rent;

of mesne assignments;

of will of late owner;

(*n*) The above form is one which was formerly in very general use, and which is still sometimes adopted on a conveyance of land purchased for partnership purposes. Where, for any reason, it may not be thought advisable to vest the property, on the decease of a partner, in the survivors (see last Precedent), the advantage of vesting the property in a trustee is that it prevents the necessity of shifting the legal estate at every change which takes place in the firm, by the introduction of a new partner, or the retirement or death of an old one.

Conveyance to trustee for firm.

XX. Conveyance of Freeholds and Leaseholds to Trustee for Partnership Firm.

the said [*vendor*] is seised of the freehold hereditaments hereby granted for an estate in fee simple, free from incumbrances; AND WHEREAS the said [*vendor*] has agreed with the said [*purchasers*] for the sale to them of the said freehold hereditaments hereby granted in fee simple in possession, and also for the sale to them of the said leasehold premises hereby assigned for the residue of the said term of 500 years respectively free from incumbrances, at the aggregate price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchasers*], of which sum the said [*vendor*] hereby acknowledges the receipt, he the said [*vendor*], at the request and by the direction of the said [*purchasers*], testified by their respectively executing these presents, hereby grants and as beneficial owner conveys unto the said [*trustee*] and his heirs, ALL, &c. [*describe freehold parcels*], TO HOLD all the premises hereby granted UNTO and TO THE USE of the said [*trustee*], his heirs and assigns, upon the trusts and for the purposes hereinafter declared and expressed of and concerning the same. AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, he the said [*vendor*], at the request and by the direction of the said [*purchasers*], testified as aforesaid, hereby assigns, and as beneficial owner conveys unto the said [*trustee*] ALL and singular, &c. [*describe leasehold premises by their modern description*], which same premises were described by their former description and demised as hereinbefore is recited by the hereinbefore recited indenture of lease, and all other (if any) the leasehold hereditaments and premises demised by the same indenture: TO HOLD all the premises hereby assigned unto the said [*trustee*], his executors, administrators, and assigns, for the residue of the said term of 500 years, UPON the trusts and for the purposes hereinafter declared and expressed of and concerning the same: AND IT IS HEREBY AGREED AND DECLARED by and between the parties hereto that the said [*trustee*], his heirs, executors, administrators, and assigns, shall stand and be seised and possessed of the said freehold and leasehold premises hereby granted and assigned respectively, in trust for the said [*purchasers*] respectively, and their respective executors, administrators, and assigns, as part of the capital or joint stock of their said

Testatum.

Grant of freeholds.

Further *testatum.*

Assignment of leaseholds.

Declaration of trust.

partnership business, and in proportion and according to their several shares, rights, and interests of and in the same; And that all the premises hereby conveyed shall, as between the real and personal representatives of the said [*purchasers*] respectively, and to all intents and purposes whatsoever, be deemed to be of the nature of personal estate (*o*).

XX. Conveyance of Freeholds and Leaseholds to Trustee for Partnership Firm.

In witness, &c.

XXI. *CONVEYANCE of* Freeholds *on Purchase by a Large Partnership, to such* Uses *as the* Partners *or any* Two *of them shall* Appoint. Powers *for the* Partners, *or any* Two *of them, to* Sell, Mortgage, Lease, *&c., the Property.*

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one part, and [*six partners*], carrying on the business of ——, at ——, in the County of ——, under the style or firm of [A. & Co.] (who are hereinafter referred to as the said purchasers), of the other part: WITNESSETH, that in consideration of the sum of £—— now paid to the said [*vendor*] by the said purchasers, of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, he the said [*vendor*] hereby as beneficial owner conveys unto the said purchasers and their heirs, All, &c. [*describe parcels*], To hold all the premises unto the said purchasers, To such uses, upon such trusts, for such interests and purposes, and generally in such manner, as the said purchasers, or the survivors or survivor of them, or any two of the said purchasers shall from time to time or at any time hereafter appoint; And in default of, and subject and without prejudice to any such appointment, and so far as any such

Parties.

Testatum.

Conveyance.

To uses as partners, or survivors, &c., or any two partners shall appoint.

(*o*) The last clause of this proviso is merely declaratory; for, in the absence of any stipulation to the contrary, "wherever a partnership purchase real estate for partnership purposes and with partnership funds, it is as between the real and personal representatives of the partner's personal estate:" see *Darby* v. *Darby*, 3 Drew. at p. 506; and see *ante*, Vol. IV., p. 282, tit. Partnerships.

No declaration against dower is necessary in the case of partnership property: see notes to *Lake* v. *Craddock*, 1 Wh. & T. L. C. 174.

XXI. Conveyance of Freeholds to such Uses as Partners, &c., shall Appoint.

appointment shall not extend, To THE USE of the said purchasers, their heirs and assigns: PROVIDED ALWAYS, and it is hereby agreed and declared by and between the said purchasers, that is, as between themselves and their respective real and personal representatives, the premises hereby conveyed shall be considered as part of the estate and property of the said partnership, and for all intents and purposes whatsoever to be of the nature of personal estate: PROVIDED ALWAYS, and it is hereby agreed and declared by and between the said purchasers, that the power of appointment hereby given or limited to the said purchasers, or the survivors or survivor of them, or to any two of the said purchasers, shall be from time to time and at any time hereafter exercisable by way of sale, mortgage, lease, or other disposition, or by all or any of such modes of disposition, and that any two of the said purchasers shall at all times hereafter have full power to sell, mortgage, lease, or otherwise dispose of the premises hereby conveyed, or any part thereof, without the concurrence of the others or other of the said purchasers, and without any further consent or sanction than is given by these presents; And that every and any sale, mortgage, lease, or other disposition of the same premises, or any part thereof, whether the same shall be under or by virtue of the said power of appointment, or shall be by the said purchasers or the survivors or survivor of them, without exercising the said power, under the limitation to the said purchasers, their heirs and assigns hereinbefore contained, shall, as regards all persons whomsoever, taking the same premises, or any part thereof, as purchasers, mortgagees, lessees, or otherwise, be valid and effectual to all intents and purposes whatsoever, and bind all persons having or claiming any estate or interest in the property of the partnership, without any concurrence, consent, or sanction on the part of such of the said purchasers as shall not be expressed to be parties to the execution of the said power, or on the part of the legal representatives of any one or more of the said purchasers who may have died; AND that no person paying to any two of the said purchasers (whether such two shall be appointors or not), or to the survivors or survivor of the said purchasers, any gross, or yearly, or other sum or sums of money in respect or on account of any such sale, mortgage, lease, or other disposition as aforesaid, and taking the receipt of the persons or person to whom such sum or

Proviso as to devolution of property purchased.

Powers of sale, mortgaging, leasing, &c.

Protection of purchasers.

XXI. Conveyance of Freeholds to such Uses as Partners, &c., shall Appoint.

sums of money shall be so paid as aforesaid, for the same, shall be bound or concerned to see to the application, or be answerable for the loss, misapplication, or non-application of the money for which such receipt shall be expressed to be given as last aforesaid, or be affected by any impropriety or irregularity on account of or in relation to any such sale, mortgage, lease, or other disposition, or the giving of any such receipt, or by notice of any partnership whatsoever between the said purchasers, or any of them, or of any trust, condition, deed, or document in anywise relating to any such partnership: PROVIDED ALWAYS that as between the survivors and survivor of the said purchasers and the legal personal representatives of such of the said purchasers as may have died, nothing herein contained shall in anywise prejudice or affect any equitable right relating to the premises hereby conveyed, or any part thereof, or to any sum or sums of money to arise or become receivable from, under, or in respect of any such sale, mortgage, lease, or other disposition of the same premises, or any part thereof, as aforesaid (*p*).

Proviso saving rights of partners, &c.

IN WITNESS, &c.

XXII. *CONVEYANCE of* FREEHOLDS *(part of a Settled Estate) by* REVOCATION *of* USES *and* APPOINTMENT *by a sole surviving* TRUSTEE *selling under a* POWER *of* SALE *in a* SETTLEMENT, *with the* CONCURRENCE *of the* TENANT FOR LIFE *and a* MORTGAGEE *of his Life Estate. A* JOINTRESS RELEASES *her jointure; and the* TRUSTEE OF THE TERM *for securing the jointure* SURRENDERS *the Term.* COVENANT *as to payment of* SUCCESSION DUTY (*q*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*trustee of settlement*], of, &c., of the first part; Parties.

(*p*) The above is a somewhat special form of conveyance on the purchase of land for partnership purposes, and has been found serviceable in practice in cases where a firm consists of numerous partners, especially where it is likely that some of the partners may occasionally be employed abroad on business of the firm.

(*q*) Cases in which trustees sell under an express power in a

XXII. Conveyance by Trustee under Express Powers.

[*tenant for life*], of, &c., of the second part (*r*); [*mortgagee*], of, &c., of the third part (*s*); [*jointress*], of, &c., widow of Sir [A. B.], Baronet, late of, &c., deceased, of the fourth part; [*trustee of jointure term*], of, &c., of the fifth part (*t*); and [*purchaser*], of, &c., of the sixth part: WHEREAS by an indenture of settlement dated, &c., and expressed to be made between [*parties*] (being the settlement made in contemplation of the then intended marriage of the said [*tenant for life*] and [*wife*] his wife, which was shortly afterwards solemnised), certain lands and hereditaments in the County of ——, including among other hereditaments the hereditaments hereinafter described and hereby appointed and conveyed, were assured, subject to the jointure rent-charge thereby limited in favour of the said [*jointress*], and to a term of 800 years vested in the said [*trustee of term*] for securing the same

Recitals: of settlement;

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settlement or will are becoming rare, as such powers are now seldom inserted in such instruments, in reliance on the extensive statutory powers vested in tenants for life under the Settled Land Act, 1882 (45 & 46 Vict. c. 38). And even as regards settlements and wills prior to the commencement of the Act, recourse is more usually had to the statutory powers than to the express powers contained in such instruments. Sometimes, however, cases arise where it is convenient to exercise express powers of sale, as where there is only one trustee of the settlement, or if it is desired to dispense with the necessity of giving the notices prescribed by the Act: see sects. 39, 45.

(*r*) The consent of the tenant for life is usually required by the terms of express powers of sale, but even if this is not so, his consent is now rendered necessary by the Settled Land Act, 1882, sect. 56 (2).

(*s*) The mortgage being for a term of years, determinable on the death of the tenant for life, the latter has still the legal estate for life subject to the term, and accordingly the tenant for life is made party of the second part, and the mortgagee of the third; if the mortgage was by grant of the life estate, the order of these parties would be reversed.

(*t*) The trustee of the term need not be made a party, unless there has been a default in payment of the rent-charge, in consequence of which he has entered, or taken action and incurred costs with a view to entry, otherwise the release of the jointure rent-charge will of itself determine the term as a "satisfied term" within the stat. 8 & 9 Vict. c. 112. A term does not become satisfied within the meaning of this Act, unless the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate are united and merged in one person: per *James*, L.J., in *Anderson* v. *Pignet*, L. R. 8 Ch. at p. 189.

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jointure rentcharge, and also subject to certain charges for portions as therein mentioned, all of which have now ceased to be payable, and to the terms thereby limited for securing the same respectively, all of which last-mentioned terms have since been surrendered or determined or otherwise merged in the inheritance of the hereditaments comprised in the indenture now in recital, to the use of the said [*tenant for life*] and his assigns during his life without impeachment of waste, with divers remainders over; and in the indenture now in recital is contained a power enabling the said [*trustees*] and the survivor of them, and the heirs of such survivor, at any time during the life of the said [*tenant for life*], at the request and by the direction of the said [*tenant for life*], (to be signified by any writing or writings under his hand and seal,) [*recite the power of sale verbatim, with the power to give receipts, and to revoke uses and appoint new uses*]; AND WHEREAS the said [*deceased trustee of settlement*] died on the —— day of ——, 18—; AND WHEREAS by an indenture of mortgage, dated, &c., and made, &c., the said [*tenant for life*], in consideration of the sum of £—— paid to him by the said [*mortgagee*], and bargained, sold, and demised (*z*) unto the said [*mortgagee*], his executors, administrators, and assigns, all the said manors and hereditaments comprised in the hereinbefore recited indenture of settlement (subject, nevertheless, as is therein mentioned), to hold the same unto the said [*mortgagee*], his executors, administrators, and assigns, for

of power of sale (*y*);

of death of trustee;

of mortgage of life estate;

(*y*) The question was formerly much agitated among conveyancers, whether a power of sale, the terms of which admit of its being exercised at any time, is or is not invalid, as contravening the well-known rule which forbids the suspension of the absolute vesting of, or of the dominion over, property for a longer period than a life in being, and a minority, or twenty-one years afterwards. See, as to this question, *post*, Vol. VI., sub tit. SETTLEMENTS.

Whether an indefinite power of sale is valid.

The terms of the power must, of course, be exactly followed in reciting it; and any ceremonies imposed upon the giving of his consent by the tenant for life must be accurately observed.

(*z*) Mortgages of life estates were formerly, as a general rule, and are still usually framed in the form above recited, so as to avoid question as to the extinguishment of powers of leasing, &c.: see *ante*, p. 402, n. (*x*). The words "bargain and sell" were employed in order that the instrument might operate as a bargain and sale for the term, as a simple demise for the term would confer on the mortgagee until entry only as an *interesse termini*, as to which, see *ante*, Vol. III., p. 291, sub tit. LEASES.

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the term of 99 years if the said [*tenant for life*] should so long live, subject to a proviso for redemption in the indenture now in recital contained (*a*); AND WHEREAS the said [*trustee of settlement*] has agreed with the said [*purchaser*] for the sale to him of the fee simple in possession, free from incumbrances, of the hereditaments hereby conveyed (being part of the said hereditaments comprised in the hereinbefore recited indenture of settlement), at the price of £——; AND WHEREAS the said [*jointress*] and the said [*mortgagee*] being satisfied that the other hereditaments remaining subject to the uses, trusts, and limitations of the hereinbefore recited indenture of settlement, are a sufficient security for the said jointure rentcharge and mortgage debt respectively, have consented to release the same therefrom respectively [and it has also been agreed that the said [*trustee of term*] shall also join in these presents in manner hereinafter appearing (*b*)]; AND WHEREAS the said [*tenant for life*] has agreed to indemnify the said [*purchaser*] in respect of the succession duty payable on the death of the said [*jointress*] in manner hereinafter appearing, and also to give to the said [*purchaser*] the acknowledgment and undertaking hereinafter contained. NOW THIS INDENTURE WITNESSETH (*c*) that, for effectuating the sale, and in consideration of the sum of £—— paid by the said [*purchaser*] to the said [*trustee of settlement*], the receipt of which sum of £—— the said [*trustee of settlement*] hereby

of contract for sale;

of agreement to release by jointress and mortgagee.

Testatum.

(*a*) The proviso for redemption should not be set forth, as the mortgagee is not paid off, but releases the lands sold.

(*b*) See, as to this recital, *ante*, p. 416, note (*t*).

Power of sale, how to be framed.

(*c*) The exercise of a power of sale, it is obvious, includes both the revocation of the subsisting uses of the settlement, and the limitation of the new uses in favour of a purchaser; and therefore it is correct to accompany such a power with an express clause of revocation; but this is not essential, for if the settlement simply authorised the donees to sell and convey, it would be sufficient: *Bishop of Oxford* v. *Leighton*, 2 Vern. 367; see Sug. Pow. 367. The express power to revoke, indeed, is often omitted, being in effect comprised in the power to appoint, since every new limitation of uses necessarily involves the revocation of the old or subsisting uses for which they are to be substituted. The purchaser's conveyance will assume the form either of a deed of revocation and new appointment, or of a deed of new appointment alone, as the power is framed in one way or the other. If the power does not require an express revocation of the uses of the settlement, the *testatum* clause in the precedent in the text which contains the revocation should be omitted.

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acknowledges, the said [*trustee of settlement*], at the request, and by the direction of the said [*tenant for life*], as beneficial owner (*d*), testified, by his joining in these presents, in exercise of the power for this purpose contained in the hereinbefore recited indenture of settlement, and of every other power enabling him in this behalf, hereby revokes and makes void All and every the uses, trusts, powers, and provisoes in and by the hereinbefore recited indenture of settlement limited concerning the said hereditaments hereinafter conveyed, and appoints, that ALL that messuage or farm-house and farm known as —— Farm, situate in the parish of —— in the County of ——, and more particularly described in the first schedule hereunder written, and delineated in the map thereof, indorsed upon the —— skin of these presents, and therein edged with a line coloured ——, shall from henceforth remain and be, and he hereby, as trustee, conveys the same premises To the use of the said [*purchaser*], his heirs and assigns. AND THIS INDENTURE ALSO WITNESSETH that, for the consideration aforesaid, the said [*jointress*], at the request of the said [*tenant for life*], as to her said jointure, hereby releases, [and the said [*trustee of term*] at the request of the said [*jointress*] and [*tenant for life*], as to the said term of 800 years, hereby surrenders, and, as trustee, conveys,] and the said [*mortgagee*] as to the said term of 99 years determinable as aforesaid, hereby surrenders, and as mortgagee conveys, unto the said [*purchaser*] and his heirs, ALL and singular the premises hereby conveyed, TO HOLD all the premises unto the said [*purchaser*], his heirs and assigns, freed and discharged from all the said jointure, and the said mortgage debt, and from all powers and remedies for securing and recovering the same respectively, and to the intent that the said terms of 800 years and 99 years respectively in the same premises may henceforth be merged and extinguished in the freehold and inheritance thereof; AND (*e*) the said [*jointress*] hereby cove-

Revocation.

Appointment.

Parcels: Farm.

Further *testatum*.

Release by jointress and mortgagee, and surrender of terms by termor and mortgagee.

Covenant by jointress against incumbrancers.

(*d*) This implies full covenants for title by the tenant for life: see *ante*, p. 220.

(*e*) A jointress is neither a mortgagee nor a trustee; and it therefore seems incorrect to state that she conveys as either one or the other, in order that the covenant against incumbrances may be implied as against her. It seems advisable that she should covenant expressly: see *ante*, p. 225.

XXII. Conveyance by Trustee under Express Powers.

nants with the said [*purchaser*], that she the said [*jointress*] has not at any time heretofore done or knowingly omitted or suffered or been party or privy to anything whereby or by means whereof the said jointure rentcharge and premises hereby released, or any part thereof, are or is or may be impeached, charged, incumbered, or affected in any manner whatsoever or whereby or by means whereof the said [*jointress*] is in anywise hindered from releasing the same premises or any part thereof in manner aforesaid; AND the said [*tenant for life*] hereby covenants with the said [*purchaser*] that the said [*tenant for life*] will, as and when the same shall become payable, pay all such succession duty as may become payable in respect of the premises hereby conveyed, or any part thereof, upon the death of the said [*jointress*], and will at all times keep the said [*purchaser*], his executors, administrators, and assigns, effectually indemnified against all claims, actions, proceedings, costs, and expenses whatsoever, for or in respect of such succession duty or any part thereof. AND the said [*tenant for life*] hereby acknowledges the right of the said [*purchaser*] to the deeds and documents mentioned in the second schedule hereunder written, and to delivery of copies thereof; AND hereby undertakes for the safe custody thereof.

Covenant by tenant for life to pay succession duty.

Acknowledgment and undertaking (*f*).

IN WITNESS, &c. (*g*).

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO.

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO.

(*f*) As to statutory acknowledgments and undertakings as to deeds, see *ante*, Vol. I., p. 251, sub tit. ACKNOWLEDGMENTS, and Vol. II., p. 718, sub tit. CONDITIONS OF SALE.

(*g*) The execution of this deed by the tenant for life must be witnessed by two witnesses in accordance with terms of the power of sale.

XXIII. *CONVEYANCE of* FREEHOLDS *by* TRUSTEES *under a* TRUST *for* SALE *contained in a* WILL *to a* PURCHASER *in* FEE SIMPLE: *the Widow consents to the sale.* ACKNOWLEDGMENT *by the* TRUSTEES *of the* RIGHT *of the purchaser to the* PRODUCTION *of* DEEDS.

THIS INDENTURE, dated the —— day of ——, 18—, and made BETWEEN [*trustee*], of, &c., and [*trustee*], of, &c., of the first part; [*widow*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part: WHEREAS [*testator*], late of, &c., duly made and executed his will, dated, &c., and thereby, after certain legacies and specific devises (which did not include the said hereditaments hereby conveyed), devised all the rest and remainder of his real estate of whatever tenure and wherever situate unto the said [*trustees*], their heirs and assigns, upon trust that they or the survivor of them, or the heirs of such survivor, their or his assigns, should, with the consent in writing of his wife the said [*widow*], during her life and widowhood, sell the same real estate by public auction or private contract as therein mentioned, with power to the said [*trustees*] for effectuating any such sale, to execute and do any such assurance and thing as they or he should think expedient; And the said [*testator*] thereby declared that the said [*trustees*] or the survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, should hold the proceeds of any such sale upon the trusts therein declared of or concerning the same; And in the said will was contained a declaration that the receipt of the said [*trustees*] or the survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, for the purchase-money of any hereditaments sold under the trust for sale thereinbefore contained, should be a sufficient discharge to the person or persons paying such purchase-money, and should exonerate them from any liability to see to the application thereof, and from being liable for any loss or misapplication thereof (*h*); And the said [*testator*] thereby appointed

Parties.

Recitals: of will devising lands on trust for sale;

(*h*) In the case of a will made or revived since the commencement of the stat. 23 & 24 Vict. c. 145 (Lord Cranworth's Act), the recital of the "receipt clause" would appear not to be strictly necessary; but, where the clause is contained in the will, it is usual and proper to set it out at length.

XXIII. Conveyance by Trustees under Trust for Sale in a Will.

[*executors*] to be the executors of his said will: And whereas the said testator died on the —— day of ——, 18—, being at the time of his death seised of the said hereditaments hereby conveyed, and without having revoked or altered his said will, which was on the —— day of ——, 18—, duly proved, &c.: And whereas the said [*trustees*], with the consent of the said [*widow*], and in execution of the trust for sale contained in the said will, have agreed with the said [*purchaser*] for the sale to him of the said hereditaments in fee simple in possession, free from incumbrances, at the price of £——: And whereas the several deeds and writings specified in the second schedule hereto relate as well to other hereditaments as to the hereditaments hereby conveyed, and upon the trusts for the said sale, it was agreed that the said [*trustees*] should give such acknowledgment in respect thereof as hereinafter appears. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*trustees*] by the said [*purchaser*], of which sum of £—— the said [*trustees*] hereby acknowledge the receipt, the said [*trustees*], with the consent of the said [*widow*], testified by her executing these presents, hereby as trustees convey unto the said [*purchaser*] and his heirs, All that [*describe parcels by reference to plan and first schedule*]: To hold all the premises unto and to the use of the said [*purchaser*], his heirs and assigns; And the said [*trustees*] hereby acknowledge the right of the said [*purchaser*] to the production of the several deeds and writings specified in the second schedule hereunder written, and to delivery of copies thereof; [And they hereby undertake for the safe custody thereof] (*i*).

of agreement for sale;

of agreement as to deeds retained.

Testatum.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

(*i*) As to the omission or modification of this undertaking in the case of fiduciary vendors, see *ante*, sub tit. Acknowledgments, Vol. I., pp. 296 *et seq.*

XXIV. *CONVEYANCE by* TRUSTEES *under a* TRUST *for* SALE *contained in a* CONVEYANCE *of even date with a Marriage Settlement* (*k*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*trustees*] (*l*), of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS, by an indenture dated, &c., and made between [*parties*], in consideration of a marriage then intended and shortly afterwards solemnized between the said [*settlor*] and the said [*wife*], the messuage, farm, and hereditaments hereby conveyed were conveyed and assured unto and to the use of the said [*original trustees*], their heirs and assigns, In trust for the said [*settlor*] and his heirs until the said intended marriage, and from and after the solemnisation thereof, upon trust that the said [*original trustees*], or the survivors or survivor of them, or the heirs of such survivor, should, at the request in writing of the said

Parties.

Recitals: of conveyance on trust for sale;

(*k*) In the text the conveyance to trustees upon trust for sale is assumed to have been drawn in the usual form, and to contain references to the intended marriage: see *post*, tit. SETTLEMENTS. If this be so, a question may be raised with regard to the right of the purchaser or his assigns to production of the settlement by which the trusts of the purchase-money is declared. It is generally considered that the purchaser is entitled to production of the settlement in order to ascertain that it contains nothing inconsistent with the power of the trustees to sell and give receipts, but that he is not entitled to an attested copy, or to any covenant for or acknowledgment of right to production of the settlement; and, consequently, that no subsequent purchaser can require its production unless it is in the possession of the immediate vendor: Dart. V. & P. 298; Sugd. V. & P. 436; 3 Dav. Conv. 44 (n); Vaizey on Settlements, 291; see also *West* v. *Reid*, 2 Ha. at p. 260; and *Cooper* v. *Emery*, cit. 1 Hayes, Conv. 573.

If, however, the conveyance in trust for sale, as is sometimes the case, contain merely a declaration that the proceeds of sale and rents and profits till sale shall be held upon trust for the settlor (the settlement of even date declaring that, notwithstanding this declaration, the proceeds and rents and profits are to be held upon the trusts therein declared), the trusts of the settlement will be kept off the title, and the difficulty as to production will be avoided.

(*l*) The trustees are, in this case, assigns of the original trustees of the settlement. For their power to exercise the trust, see *ante*, p. 33.

XXIV. Conveyance by Trustees under Trust for Sale in a Deed.

[*settlor*] and [*wife*], during their joint lives, and of the survivor of them during his or her life, and, after the death of such survivor, at the discretion of the said trustees or trustee for the time being, sell the same premises therein comprised, either together or in parcels, and either by public auction or private contract, and either with or without any special stipulations as to title or evidence or commencement of title or otherwise, and might for the purposes aforesaid or any of them execute and do all such assurances and things as they or he should think fit; And should by and out of the moneys which should arise from any such sale as aforesaid pay the expenses incurred in and about the same or otherwise in or about the execution of any of the trusts or powers of the indenture now in recital, and should stand possessed of the residue of the same moneys and also the rents and profits of the said premises or of such part or parts thereof as should for the time being remain unsold Upon such trusts and with and subject to such powers, provisoes, agreements, and declarations as were declared of and concerning the same respectively by an indenture then already engrossed and bearing even date with the indenture now in recital, and made between [*parties*]; And it was thereby declared that the said [*settlor*] and [*wife*], during their joint lives, and the survivor of them during his or her life, should have power to appoint new trustees thereof: And whereas [*recite death of two original trustees*]: And whereas, by an indenture dated, &c., and made between [*parties*], the said [*settlor and wife*], in exercise of the power in that behalf vested in them by the Conveyancing and Law of Property Act, 1881, appointed the said [*two new trustees*] to be trustees of the said indenture of the —— day of ——, 18—, in place of the said [*two deceased trustees*], and the said [*settlor and wife*] thereby declared that all the estate and interest then vested in him the said [*surviving trustee*] of and in the said lands and hereditaments, subject to the trusts of the hereinbefore recited indenture of the —— day of ——, 18—, should forthwith vest in the said [*surviving and new trustees*], as trustees of the last-mentioned indenture and as joint tenants upon the trusts and for the purposes of the same: And whereas [*recite death of wife, and of surviving original trustee and appointment of third new trustee in his place; also death of settlor*]; And whereas the said [*trustees*], in execution of the trust for sale

of appointment of new trustees;

and vesting declaration;

of agreement for sale.

XXIV. Conveyance by Trustees under Trust for Sale in a Deed.

contained in the hereinbefore recited indenture of the —— day of ——, 18—, have agreed with the said [*purchaser*] for the sale to him of the hereditaments hereby conveyed in fee simple in possession, free from incumbrances, at the price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*trustees*] by the said [*purchaser*], of which sum of £—— the said [*trustees*] hereby acknowledge the receipt, the said [*trustees*] hereby as trustees convey unto the said [*purchaser*] and his heirs ALL THAT messuage, farm-house, or tenement, with the stables, barns, and outhouses thereto belonging, and all the several closes or pieces of meadow and arable land, woods, and land covered with water, commonly known as the —— Farm, all which hereditaments are situate in the parish of ——, in the county of ——, and are more particularly described with the acreage and nature and quality thereof respectively in the Schedule hereunder written, and are delineated in the map thereof drawn on these presents and therein coloured —— : TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns.

Testatum.

Conveyance.

Parcels :

Farm-house and farm.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XXV. *CONVEYANCE on a* PURCHASE *by* TRUSTEES *under a* POWER *in a Marriage Settlement, with the Consent of the Parties beneficially interested; the Conveyance being made to the Uses of the Settlement.*

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of, &c., of the first part; [*husband*], of, &c., and [*wife*] his wife, of the second part; and [*trustees*], of, &c., of the third part: [*Recite the assurance or other*

Parties.

XXV. Conveyance on Purchase by Trustees Under a Power.

means by which the vendor became seised in fee]: AND WHEREAS, by an indenture of release, dated, &c., and grounded on a lease for a year, and expressed to be made between [*parties*] (being the settlement made on the marriage of the said [*husband*] and [*wife*], his wife), certain freehold hereditaments were conveyed and assured to the uses, upon the trusts, and subject to the powers, provisoes, and declarations therein expressed and declared concerning the same (*o*); And by the indenture now in recital, a sum of 5000*l.* 3*l.* per cent. Consolidated Annuities were settled and assured upon certain trusts therein mentioned; And in the same indenture was contained a power enabling the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, with the consent in writing of the said [*husband*] and [*wife*] his wife, or the survivor of them, to sell and dispose of the said 5000*l.* 3*l.* per cent. Consolidated Annuities, or any part thereof, and to lay out and invest the moneys arising from such sale in the purchase of freehold or copyhold hereditaments held for an estate in fee simple; which hereditaments, when so purchased, should be settled and assured to the uses, upon the trusts, and subject to the powers, provisoes, and declarations expressed and declared concerning the freehold hereditaments thereby settled and assured, or such of the said powers, provisoes, and declarations as should be then subsisting, undetermined, and capable of taking effect;

Recital of settlement, containing the power to purchase (*n*).

Contract for purchase.

AND WHEREAS the said [*trustees*], in pursuance of the said power contained in the said indenture of settlement, have, with the consent of the said [*husband*] and [*wife*], agreed with the said [*vendor*] for the purchase (*p*) of the unincumbered fee simple of the hereditaments hereinafter conveyed at the price of £——; And the said [*trustees*], for the purpose of enabling them to pay the said purchase-money, have, with

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Lease and release.

(*n*) If the instrument operated not only as a release of freeholds but also as an assignment of leaseholds, or covenant to surrender copyholds, or otherwise, say, "grounded, so far as the same operated as a release, on, &c." Conveyances by way of lease and release are now obsolete, but are occasionally met with in practice, and require to be recited in deeds and other instruments.

(*o*) In the present case, the statement of the uses of the settlement may be dispensed with, reference being made to them merely as in the text. For a form of recital, where the uses of the settlement are set out, see *ante*, p. 416.

(*p*) See, with respect to the form of this recital, *ante*, p. 149.

such consent as aforesaid, sold out a competent part of the said 5000*l.* 3*l.* per cent. Consolidated Annuities: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said sale, and in consideration of the sum of £—— paid by the said [*trustees*] to the said [*vendor*], with the consent of the said [*husband*] and [*wife*], his wife, testified by their severally executing these presents, the receipt of which sum the said [*vendor*] hereby acknowledges, the said [*vendor*] grants, and as beneficial owner conveys unto the said [*trustees*] and their heirs [*describe parcels*]; To HOLD all the premises UNTO the said [*trustees*], and their heirs, To THE USES, upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, and declarations in and by the hereinbefore-recited indenture of settlement declared and contained concerning the hereditaments thereby assured, or such and so many of the said uses, trusts, intents, and purposes, powers, provisoes, and declarations as are now subsisting, and capable of taking effect (*q*).

XXV. Conveyance on Purchase by Trustees Under a Power.

Testatum.

Vendor, in consideration of purchase-money, releases to purchasers.

Habendum.

To uses of settlement.

IN WITNESS, &c.

XXVI. *CONVEYANCE upon a Sale by the* TRUSTEES OF A WILL *to* TRUSTEES OF A SETTLEMENT, *where there have been* CHANGES *amongst the persons* BENEFICIALLY ENTITLED, *and amongst the* TRUSTEES *under the Settlement.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*trustees of will*], of, &c., of the one part, and [*trustees of settlement*] of the other part: WHEREAS [*testator*], late of, &c., made his will, dated the —— day of ——, 18—, and thereby devised (amongst other things) all his freehold and copyhold hereditaments in the County of —— unto A. B. and the said [*trustees of will*], the trustees of his will

Parties.

Recitals: of will;

(*q*) The reference to uses in this instance is simple, as there have been no changes in the trusteeship or in the beneficial enjoyment since the date of the settlement. For a more complicated case see the next Precedent.

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(thereinafter called his trustees), upon trust that his trustees should, with the consent in writing of [*wife*], his wife, during her life, and after her death at the discretion of his trustees, sell the same, either together or in parcels, and either by public auction or private contract, and with power to make any stipulations as to title or evidence or commencement of title, as to them should seem proper; And the said [*testator*] thereby declared that his trustees should stand possessed of the proceeds of such sale, upon the trusts in the said will declared [*add receipt clause, if the will contains one*]; And the said [*testator*] thereby appointed [*executors*] to be his executors; And whereas the said [*testator*] made two several codicils, dated respectively the —— day of —— and the —— day of ——, 18—, to his said will, but did not thereby alter his said will, so far as the same is hereinbefore recited: And whereas the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, so far as the same is hereinbefore recited, and without having revoked or altered the said codicil to his said will; and the said will and codicil were proved by the said [*executors*], the executors therein named, in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice, on the —— day of ——, 18—; And whereas (*r*), by an indenture of settlement, dated the —— day of ——, 18—, and made, &c. (being a settlement made upon the marriage of the said [*husband*] and [*wife*]), certain freehold hereditaments were assured and limited to the use of the said [*husband*], his heirs and assigns, until the solemnization of the said marriage, and after the solemnization thereof (subject to certain charges which have now determined) to the use of the said [*husband*] and his assigns, without impeachment of waste, with remainder to the use of [*trustees to preserve contingent remainder*], and their heirs during the life of the said [*husband*], in trust for him and his assigns, and to preserve the contingent remainders; with remainder to the use of the first and every other son of the said [*husband*] by the said [*wife*] successively, according to their respective seniorities in tail male; with divers remainders over; and in the indenture

of codicil;

of death and probate;

of settlement;

(*r*) This recital, being the commencement of a new title, should be a general recital (see *ante*, p. 145), and is accordingly framed as such.

XXVI. Conveyance by Trustees of Will to Trustees of Settlement.

now in recital was contained a power enabling the said [*husband*], if he should thereafter marry any woman other than the said [*wife*], either before or after his marriage with any other woman, by any deed or deeds, with or without power of revocation, and new appointment to appoint to any woman whom he might so marry, for her life or any less period, any yearly rentcharge or rentcharges by way of jointure, not exceeding in the whole the yearly sum of £——, to be charged upon all or any of the said hereditaments thereby assured, to be paid in such manner, and with such powers and remedies for recovering and enforcing payment of the said rentcharge or rentcharges as therein mentioned; And also to appoint the premises so charged to any person or persons, for any term of years, in such manner and upon such trusts as therein mentioned; And in the same indenture was contained a power for the said [*trustees*] (*s*) and the survivor of them, and the executors and administrators of such survivor, after the death of the said [*husband*], during the minority of any son of the said marriage, who if of full age would be entitled to the possession or the receipt of the rents and profits of the said hereditaments thereby assured, at the discretion of the trustees or trustee for the time being, to sell (*t*) all or any of the said hereditaments thereby assured in manner therein mentioned; And it was thereby declared that the trustees or trustee for the time being should receive all moneys which might become payable upon any such sale as aforesaid, and with all convenient speed, invest the same in the purchase of other lands or hereditaments, in England or Wales, for an estate in fee simple (*u*); And it was also agreed that the trustees or trustee for the time being should settle and assure, or cause to be settled and assured, all such of

(*s*) The husband being deceased at the date of this conveyance, the conditions attached to the exercise of the power of sale during his life are omitted.

(*t*) If any of the money which is being invested by the trustees of the settlement has arisen from money received upon an exchange, for equality of exchange, the portion of the power relating to exchanges must be recited; and similarly, if it has arisen from enfranchisement or otherwise, the powers to enfranchise, &c., must be recited; and the appropriate words must be added in the trust of moneys arisen from sale, &c., which follows.

(*u*) The remainder (if any) of the trust may be omitted, as the purchase is of freeholds; and see note (*s*) above.

XXVI. Conveyance by Trustees of Will to Trustees of Settlement.

the lands or hereditaments, so to be purchased as aforesaid, as should be freeholds of inheritance to the uses, upon the trusts and with and subject to the powers, provisoes, agreements, and declarations in and by the indenture now in recital limited, expressed, and declared, or under the powers thereinbefore contained of jointuring, to be limited, expressed, or declared of and concerning the said hereditaments thereby assured, or as near thereto as the deaths of parties and other intervening circumstances would admit of, but not so as to increase or multiply charges or powers of charging; AND in the same indenture was contained a power of appointing a new trustee in the place of any trustee who should die (*x*);

of marriage and issue;

AND WHEREAS the said marriage was solemnised on the —— day of ——, 18—, and there was issue of the said marriage one son only [*son*], who, having been born on the —— day of

of death of wife;

——, 18—, has not yet attained his majority; AND WHEREAS the said [*wife*] died on the —— day of ——, 18—;

of death of trustee, and appointment of new trustee.

AND WHEREAS [*recite death of one of the original trustees of settlement, appointment of new trustee, and conveyance to him and surviving trustee* (*y*)]; AND WHEREAS the said [*husband*], on the

of second marriage and appointment of jointure and jointure terms;

—— day of ——, 18—, intermarried with [*second wife*], and by deed poll under his hand and seal, dated, &c. [*with appointment of jointure to second wife, and of the hereditaments comprised in the indenture of settlement to the use of trustees for a term to secure the jointure*]; AND WHEREAS the said [*husband*]

of sale of part of settled lands;

died on the —— day of ——, 18—; AND WHEREAS the said [*trustees of settlement*] have recently, in exercise of the power vested in them by the hereinbefore recited indenture of settlement, sold certain of the said hereditaments thereby assured;

of agreement for sale.

AND WHEREAS the said [*trustees of will*] have, in exercise of the trust in that behalf vested in them by the hereinbefore recited indenture of settlement, agreed with the said [*trustees of settlement*], for the sale to them of the fee simple in possession of the said hereditaments hereby conveyed at the price

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(*x*) This part of the recital will be omitted if the settlement does not contain it, as the appointment recited later on would then be made under the statutory powers: see *ante*, Vol. II., sub tit. APPOINTMENT OF NEW TRUSTEES, pp. 3–7.

(*y*) If the appointment of the new trustee was made after December 31, 1881, the property will have passed by vesting declaration: see *ante*, Vol. II., p. 29; and for a form of recital of such declaration, see *ante*, p. 424.

XXVI. Conveyance by Trustees of Will to Trustee of Settlement.

of £——, which is intended to be paid by the said [*trustees of settlement*] out of moneys in their hands arising from the sale of the said hereditaments so sold by them as aforesaid. NOW THIS INDENTURE WITNESSETH that, for effectuating the said sale, and in consideration of the sum of £—— paid to the said [*trustees of will*] by the said [*trustees of settlement*], of which sum of £—— the said [*trustees of will*] hereby acknowledge the receipt, the said [*trustees of will*] do, and each of them doth hereby grant, and as trustees convey, unto the said [*trustees of settlement*] and their heirs, ALL THAT, &c. [*parcels*], TO HOLD all the premises UNTO the said [*trustees of settlement*] and their heirs, TO THE USES, upon the trusts, and with and subject to the powers, provisoes, agreements, and declarations which under or by virtue of the hereinbefore recited indenture of settlement of the —— day of ——, 18—, and any deed or writing, whereby any of the powers (other than those of leasing) (*z*) in such indenture contained, have been duly exercised, and in consequence of any births or deaths are now subsisting or capable of taking effect in such of the hereditaments comprised in such indenture of settlement as remain unsold, but not so as to increase or multiply charges, or powers of charging.

Testatum.

Conveyance.

Parcels.

Habendum.

IN WITNESS, &c.

(*z*) If there have been any portions charged upon the settled land, and secured, as is frequently the case, by mortgage, add here, "and mortgaging for the purpose of raising portions."

The declaration of uses will require, as a rule, careful modification so as to adapt it to the circumstances of the case. Thus, in the text, births and deaths are referred to because the limitations to which the settled property is subject have been varied by the birth of the son and by the death of the husband, and possibly, also (if a jointure was limited to her), of the first wife.

XXVII. Conveyance of Freeholds by Tenant for Life under Settled Land Act, 1882.

XXVII. *CONVEYANCE of* FREEHOLDS *on sale by* TENANT FOR LIFE *under the* SETTLED LAND ACT, 1882; *the* PURCHASE-MONEY *being paid to the* TRUSTEES *of the* SETTLEMENT (*a*). VARIATIONS *where the* PURCHASE-MONEY *is paid into* COURT, *and where the* SALE *includes the Principal* MANSION-HOUSE, &c.

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*tenant for life*] (*b*), of, &c., of the first part; [*trustee*], of, &c., and [*trustee*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part: WHEREAS, under or by virtue of an indenture of settlement dated, &c., and made, &c., the hereditaments hereby conveyed stand limited to certain uses, under which the said [*tenant for life*] is tenant for life in possession thereof, with remainders over, and the said indenture of settlement contains a power for the said [*tenant for life*] to raise a sum or sums of money by way of portions for his children as therein mentioned, and also contains a power for the said [*trustees*] (*c*), with the consent of the said

Recitals: of title of tenant for life;

of power of sale;

(*a*) See as to notice to be given to the trustees of the settlement, *ante*, p. 53.

(*b*) Certain persons, other than those strictly denominated tenants for life, are entitled under sect. 58 of the Act, to exercise the powers conferred upon a tenant for life by the Act. These are enumerated in Vol. III., pp. 29, 30, sub tit. LEASES; see also *ante*, p. 42. Married women (alone, if entitled for their separate use, otherwise jointly with their husband) can, under sect. 61, exercise the powers of a tenant for life under the Act. In the case of a lunatic (*i.e.*, a lunatic so found by inquisition) the powers are exerciseable by his committee, and the committee will convey in the name of the lunatic, and the latter would not be a party to the conveyance. With respect to the case of an infant absolutely entitled, see *post*, pp. 470 *et seq.*, Precedent XLII., and the notes thereto.

Undivided shares.

If the settled land be an undivided share, the tenant for life has, under sect. 19, all necessary powers of concurrence with his co-owners in the sale of the entirety.

Restrictive covenants.

A tenant for life, upon a sale of settled land, may impose restrictive covenants upon the purchaser, or may enter into such covenants so as to bind the settled land: see sect. 4 (b).

Sale of principal mansion house.

(*c*) If the property sold be the principal mansion house of the settled estate, and the demesnes usually held therewith, the consent of the trustees, or an order of the Court, is necessary to enable the tenant for life to sell: see Settled Land Act, 1882, sect. 15, and *ante*, p. 44. If the sale is made with the consent

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[*tenant for life*] (*d*), to sell the said hereditaments as therein mentioned: AND WHEREAS no money has been actually raised under the said power of portioning at the date of these

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of the trustees, the trustees will be necessarily parties, and then will be recited as follows:—

"AND WHEREAS the said [*trustees*] have agreed to testify their consent to such sale in manner hereinafter appearing."

Sale with sanction of court.

If the sale be made with the sanction of the Court, the trustees will not be necessary parties unless they are to receive the purchase-money. The following recitals will be inserted:—

"AND WHEREAS, by an order of the Chancery Division of her Majesty's High Court of Justice, dated the —— day of ——, 18—, and made by Mr. Justice X. In the matter of the —— estate, &c. [*set out the full title of the matter*], on the application of the said [*tenant for life*], the tenant for life under the said settlement, it was ordered that the said [*tenant for life*], or his successors, be at liberty to sell the principal mansion-house and the lands usually held therewith (being the said lands and hereditaments hereby conveyed)."

If the sale is made pursuant to a contract conditional upon the order of the Court being obtained, the recital in the text relating to the contract will be varied accordingly.

(*d*) In the case in the text the trustees of the settlement are, by the definition contained in sect. 2 (8) of the Settled Land Act, 1882, trustees of the settlement for the purposes of the Act. If the settlement contain a clause appointing the trustees to be trustees for the purposes of the Act, this clause should be recited. If there be no trustees satisfying this definition, application must be made to the Court for the appointment of trustees of the settlement for the purposes of the Act, and the order must be recited: see *post*, p. 444. It would appear to be advisable in all cases, whether the trustees are parties to the conveyance or not, to show by the recitals who are the trustees of the settlement for the purposes of the Act, for it would seem that if a purchaser has notice that there are no such trustees, or, as the case may be, that there was only one such trustee, or that there was not the proper number of such trustees in existence at a time which would admit of the proper notice being given (see sect. 45 of the Act), he would have notice that the requirements of the Act had not been satisfied; and he would probably not get a good receipt for his purchase-money, and his title would at least be questionable. It may, perhaps, be doubted whether, on a subsequent sale to the purchaser, he could be required to show that the proper number of trustees was in existence at the proper date; but it would be prudent, at all events, to have a record of the fact upon the face of his conveyance. The foregoing remarks (with the exception of that relating to the validity of the receipt) appear to be applicable when the purchase-money is paid into Court.

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of agreement for sale.

Testatum.

presents (*e*): And whereas the said [*tenant for life*], as such tenant for life as aforesaid, has agreed with the said [*purchaser*] for the sale to him in fee simple in possession, free from incumbrances, of the said hereditaments hereby conveyed, at the price of £—— (*f*): And whereas [*recite agreement for acknowledgment and undertaking as to deeds*]. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration (*g*) of the sum of £—— paid by the said [*purchaser*] by the direction of the

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(*e*) It is advisable, having regard to sect. 20 of the Act of 1882, to refer, in reciting the settlement, to any power of charging the estate by way of portions or otherwise, and to recite that no money has been actually raised under any such power, in order to preclude a future purchaser, after the lapse of twenty years, from making any requisition as to estates, interests, or charges, conveyed or created for securing such money. It must be borne in mind that a sale by a tenant for life under the Settled Land Acts is subject to requisitions as to the validity of the exercise of the statutory power, the effect of the then intended conveyance, &c., as in the case of the exercise of an express power of sale. As to the insertion of negative recitals generally, see *ante*, p. 140.

Payment of purchase-money into Court.

(*f*) The tenant for life has the option, under sect. 22, to direct whether the purchase-money shall be paid into Court or to the trustees. If he chooses to direct payment into Court, the trustees will not be parties to the conveyance unless, having the legal estate, they give an acknowledgment in respect thereto, the following recitals will be here inserted:—

"And whereas, upon the said agreement being entered into, the said [*purchaser*] paid to the said [*tenant for life*] the sum of £——, by way of deposit; And whereas, in pursuance of an order of the Chancery Division of her Majesty's High Court of Justice, dated, &c., and made by Mr. Justice X.: In the matter, &c., the sum of £——, being the amount of the said deposit, after deducting therefrom the costs of paying in the same, was paid by the said [*tenant for life*] into Court to to the credit of, &c.; And whereas, in pursuance of an order, &c., the sum of £——, being the amount of the said purchase-money after deducting therefrom the said deposit, were duly paid by the said [*purchaser*] into Court to the credit aforesaid."

(*g*) If the purchase-money be paid into Court, the consideration will be stated as follows:—

"In consideration of the said sum of £—— and £—— (making together the sum of £——) so paid as aforesaid, of which sums of £—— and £—— the said [*tenant for life*] hereby acknowledges the payment in manner aforesaid."

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said [*tenant for life*] to the said [*trustees*] as such trustees as aforesaid (*h*), the receipt and payment whereof in manner aforesaid the said [*trustees*] and the said [*tenant for life*] respectively hereby acknowledge, the said [*tenant for life*], in exercise of the power in this behalf given to him by the Settled Land Act, 1882, and of every or any other power enabling him (*i*), hereby, as beneficial owner, conveys unto the said [*purchaser*] and his heirs ALL those the several closes and parcels of land, containing in the whole —— acres, —— roods, or thereabouts, situate and being in the parish of ——, in the county of ——, all which closes and parcels of land and hereditaments are more particularly described in the first schedule hereunder written: TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, Freed and discharged from the limitations, powers, and provisoes of the said indenture of settlement, and from all estates, interests, and charges subsisting or to arise thereunder: PROVIDED ALWAYS, that so far as regards the reversion or remainder expectant on the life estate of the said [*tenant for life*] in the premises hereby conveyed, and the title to and the further assurance thereof after his decease, the covenants on his part implied in these presents by statute shall not extend to the acts or defaults of

Parcels.

Proviso restricting covenants for title (*j*).

(*h*) The trustees join, in the precedent in the text, only for the purpose of receiving the purchase-money. The power to convey, conferred on the tenant for life by sect. 20, gives him a statutory power (analogous to the common law power sometimes given to executors) to transfer the fee simple, or other estate, the subject of the settlement, which is quite independent of any powers vested in the trustees by the settlement itself. It seems therefore superfluous to make the trustees convey, though this course is sometimes adopted: see *post*, p. 448, note (*r*). An express covenant by the trustees that they have not incumbered may be inserted after the habendum. For a form of such covenant, see *ante*, p. 419, *mutatis mutandis*.

(*i*) In the case of a sale of a principal mansion-house, &c., add (as the case may require)—

"With the consent of the said [*trustees*] testified by their respectively executing these presents."

Sale of mansion-house, &c.

or,

"By the order and with the sanction of the Court, testified by the hereinbefore recited order of, &c."

(*j*) A limitation of this kind is usually inserted where a tenant for life conveys under an express or statutory power: see Dart, V. & P. 548.

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any person other than or except himself and his own heirs and persons claiming or to claim through or in trust for him or them; And the said [*tenant for life*] (*k*) hereby acknowledges, &c. [*acknowledgment and undertaking as to deeds and documents of title, ante*, p. 381].

Acknowledgment, &c. as to deeds.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

XXVIII. *Conveyance under* Settled Land Act, 1882, *on* sale *by* Tenant for Life *of* Freeholds *and* Leaseholds, *being parts of two* Settled Estates, *with an existing* Right *of* Way: *a* Mortgage *being* paid off *out of the purchase-money, and the* Reconveyance *taken by a* separate Deed.

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

Between Sir [*tenant for life*], of, &c., Baronet (hereinafter referred to as Sir [*tenant for life*], party hereto), of the first part; [*trustees*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part:

Recitals: of mortgage;

Whereas [*recite mortgage to secure* 20,000*l.* *and interest, and the title of mortgagees of the X. estate, from its creation to date of conveyance*]:

of will and codicil of original settlor;

And whereas the said Sir [A. B.], the grandfather of the said Sir [*tenant for life*], party hereto, made and executed his will, dated, &c., and thereby devised All his manors and freehold messuages, lands, tenements, and hereditaments in the counties of —— and ——, or elsewhere, comprising (with other hereditaments) the hereditaments described in the first schedule and in the first part of the second schedule to these presents respectively, and intended to be hereby conveyed to the use of his eldest son [C. B.], for his life, with remainder

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(*k*) In the Precedent in the text the tenant for life is assumed to have the legal estate, and in that case he has the custody of the deeds, and is the proper person to give the requisite acknowledgment. If the legal estate is vested in the trustees, the deeds will presumably be in their custody, and they will accordingly give an acknowledgment of the purchaser's right to production thereof; as to whether they should also give an undertaking for safe custody of the deeds, see *ante*, Vol. I., p. 226, sub tit. Acknowledgments.

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to the use of [*trustees of will*], their heirs and assigns, in trust to preserve contingent remainders during the life of the said [C. B.] as therein mentioned, and, after his decease, to the use of the said [*tenant for life*] (now the said Sir [*tenant for life*], party hereto), the eldest son of the said [C. B.], for his life, with divers remainders over; And the testator thereby bequeathed All his leasehold messuages, lands, and tenements in the county of —— aforesaid, being the leasehold properties described in the second part of the second schedule to these presents, and intended to be hereby conveyed to the said [*trustees of will*], their executors, administrators, and assigns, for the residues of the several terms for which he held the same respectively, upon trusts corresponding with the uses and trusts thereinbefore limited and declared respectively of and concerning the said freehold hereditaments thereby devised so far as the nature and tenure of the property would permit: And whereas the said Sir [A. B.], the testator, made a codicil, dated, &c., to his said will, and thereby charged all his real estate with certain annual payments, but did not otherwise alter or affect his said will so far as the same is hereinbefore recited: And whereas the said Sir [A. B.] died on the —— day of ——, 18—, without having revoked or altered his said will, except so far as the same was altered by the said codicil, and without having revoked or altered his said codicil, which were, on the —— day of ——, 18—, duly proved in the Prerogative Court of the Archbishop of Canterbury by the said [*trustees of will*], the executors named in the said will: And whereas, by the —— Estates Act, 18—, the manors, messuages, lands, tenements, and hereditaments, late of the said Sir [A. B.], the grandfather, deceased, and respectively specified in the first and second schedules thereto, the [X.] Estate, consisting of all the hereditaments comprised in the hereinbefore recited indenture of mortgage of the —— day of ——, 18—, and parts whereof are intended to be hereby conveyed, being set forth in such first schedule, and the [Y.] Estate, parts whereof are intended to be hereby granted and assigned respectively, being included in such second schedule, are absolutely vested in [*trustees under Act*], their heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively, freed and discharged from all gifts, devises, uses, trusts, limitations, annuities, charges, powers and provisions contained, given, or

of death and probate;

of a private Act of Parliament dealing with the settled estates;

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declared in or by, or owing or exerciseable under or by virtue of the hereinbefore recited will and codicil of the said Sir [A. B.], the grandfather, deceased, or either of them, but nevertheless upon trust for the purposes of that Act; and by the said Act the said [*trustees under Act*] and the survivors and survivor of them, and the heirs of such survivor, and other the person or persons from time to time appointed under that Act to be the trustees in their respective places (and who were therein called "the trustees"), were directed or empowered by sale or mortgage of the estates comprised in the said Act or some parts or part thereof, to raise money for the purposes therein mentioned, And also to purchase other land and hereditaments; And it was thereby declared that, subject to the trusts, powers, and provisions of the Act now in recital, the trustees should stand seised of the estates respectively specified in the said first and second schedules thereto, and the lands from time to time to be purchased by them as aforesaid, Upon such trusts and for such purposes as would best or nearest correspond with or satisfy the uses and purposes declared or directed in or by the hereinbefore recited will and codicil of the said Sir [A. B.], deceased, with respect to the estates specified in the said first and second schedules to the same Act (which uses and purposes were those hereinbefore recited or referred to), and with and subject to the powers by the said Act given or made exerciseable concerning the same;

of succession of father, his death and succession of tenant for life;

And whereas, upon the death of the said Sir [A. B.], his son the said [C. B.] became Sir [C. B.], Baronet, and he died on the —— day of ——, 18—, whereupon his eldest son the said Sir [*tenant for life*] party hereto became tenant for life in possession of the estates devised by the will of the said Sir [A. B.], the grandfather; And whereas [*a trustee under Act*] died on the —— day of ——, 18—;

of death of trustee under Act;

And whereas, by an indenture dated, &c., and made, &c., the said Sir [*tenant for life*], party hereto, granted unto the said [*surviving trustees under Act*] and their heirs the hereditaments described in the second schedule hereunder written and secondly hereby conveyed, To hold the same unto and to the use of the said [*surviving trustees under Act*], their heirs and assigns, Upon the trusts expressed and declared in and by the said —— Estates Act, 18—;

of conveyance of part of lands upon trusts of will;

of appointment of trustees by Court, under Trustee Act, 1850.

And whereas, by an order of the Chancery Division of her Majesty's High Court of Justice, made by the Vice-Chancellor, Sir [M. N.], on

the —— day of ——, 18—, "In the matter of the —— Estates Act, 18—," and "In the matter of the Trustee Act, 1850," upon the petition of the said [*surviving trustees under Act*], &c., the said [*present trustees*] were appointed trustees of the said —— Estates Act, 18—, in substitution for the said [*deceased trustee*], deceased, and [*surviving trustees under Act*], who retired from the trusteeship; AND WHEREAS doubts having arisen whether the said [*present trustees*] were trustees for the purposes of the Settled Land Act, 1882, by an order of the Chancery Division of her Majesty's High Court of Justice, made by the Honourable Mr. Justice [O. P.], at chambers, on the —— day of ——, 18—, "In the matter of the Y. Estate and [*certain other estates*], all situate in the county of ——, and the X. Estate, situate in the county of ——, settled by a settlement made by the —— Estates Act, 1858," and "In the matter of the Settled Land Act, 1882," upon the application of the said Sir [*tenant for life*], party hereto, as tenant for life under the said settlement, it was ordered that the said [*present trustees*] be and they were thereby appointed trustees of the said settlement for the purposes of the Settled Land Act, 1882; AND WHEREAS the said Sir [*tenant for life*], party hereto, as such tenant for life as aforesaid, by virtue and in exercise of the power in that behalf given to or vested in him by the Settled Land Act, 1882, lately contracted with the said [*purchaser*] for the sale to him of the unincumbered fee simple in possession of the hereditaments hereby conveyed, for the sum of 30,000*l.*; AND WHEREAS at the request, and by the direction of the said Sir [*tenant for life*], party hereto, the said [*purchaser*] has now already paid the sum of 20,000*l.*, part of the said purchase-money, to the said [*trustees*], as trustees of the said settlement, as they and the said Sir [*tenant for life*] party hereto hereby respectively acknowledge; AND WHEREAS, by an indenture bearing even date with but intended to be executed immediately before the execution of these presents, and made between the said [*mortgagees*], of the first part; the said Sir [*tenant for life*], party hereto, of the second part; and the said [*trustees*], of the third part, after reciting, as the facts were, that the said

of appointment of trustees under Act as trustees under settlement;

of contract for sale;

of payment of part of purchase-money;

of re-conveyance (*l*);

(*l*) In the transaction in the text, the number of parties made it advisable to take the reconveyance by the mortgagees by a separate deed.

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mortgage debt of 20,000*l.* secured by the hereinbefore recited indenture of mortgage still remained due and owing upon the said indenture, but that all interest under the said indenture had been paid up to the date of the indenture now in recital, and that the said Sir [*tenant for life*], party hereto, had directed the said [*trustees*] to apply the said sum of 20,000*l.*, paid to them by the said [*purchaser*] as aforesaid, in discharge of the said mortgage debt, to the intent that the said contract for sale might be carried out, It was witnessed that in consideration of the said sum of 20,000*l.* to the said [*mortgagees*] paid by the said [*purchaser*], at the request and by the direction of the said Sir [*tenant for life, party hereto*], the said [*mortgagees*] (*m*) conveyed unto the said [*trustees*] All and singular the lands and hereditaments comprised in the hereinbefore recited indenture of mortgage, comprising (with other hereditaments) the hereditaments described in the first schedule to these presents and expressed to be first hereby granted, or which by any means were then vested in the said [*mortgagees*], subject to redemption by virtue of that indenture, To hold the same free from the said indenture of mortgage, unto and to the use of the said [*trustees*], their heirs and assigns, but upon the trusts and for the interests and purposes expressed or referred to in or by the said —— Estates Act, 18—; AND WHEREAS the several freehold and leasehold hereditaments hereby conveyed are respectively subject to the several leases, underleases, and tenancies affecting the same respectively, and mentioned in the first and second schedules hereunder written respectively. NOW THIS INDENTURE WITNESSETH that, for effectuating the said sale, and in consideration of the sum of 20,000*l.* so paid to the said [*mortgagees*] by the said [*purchaser*], at the request of the said Sir [*tenant for life*] party hereto (*mm*) as aforesaid, and of the further sum of 10,000*l.* now paid to the said [*trustees*] by the said [*purchaser*], at the request of the said Sir [*tenant for life*] party hereto, of which sum of 10,000*l.* the said [*trustees*] hereby

of leases, &c., affecting the property sold.

Testatum.

(*m*) Omit "as mortgagees." In reciting conveyances, framed in accordance with the provisions of the Conveyancing and Law of Property Act, 1881, it will be proper to omit the words "as beneficial owner," and the like, as their only virtue is to imply covenants for title, which are not proper to be recited.

(*mm*) As to payment to trustees of a settlement appointed by the Court, see *Cookes* v. *Cookes*, 34 Ch. D. at p. 502.

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acknowledge the receipt, and of which two sums of 20,000*l.* and 10,000*l.* he the said Sir [*tenant for life*] party hereto hereby acknowledges the payment in manner aforesaid, He the said Sir [*tenant for life*] party hereto, by virtue and in exercise of the powers vested in him by the Settled Land Act, 1882, and of every or any other power enabling him in this behalf, hereby as beneficial owner conveys, and the said [*trustees*] as trustees hereby confirm and convey (*n*) unto the said [*purchaser*] his heirs, executors, and administrators: First, All those freehold pieces or parcels of land, with the messuages and other buildings thereon, situate on the south side of the —— Railway, in the parish of [X.], and the county of ——, and extending southwards to the mid-stream of the River ——, all which same hereditaments form the [X.] Estate comprised (with other hereditaments) in the first schedule to the hereinbefore recited —— Estates Act, 18—, and are particularly described in the first schedule to these presents, and are also with the boundaries thereof delineated in the plan endorsed on the —— skin of these presents, being in such plan coloured red; Together with full right for the said [*purchaser*], his heirs and assigns, and his and their agents, servants, tenants, workmen, and licensees, at all times to pass and repass over and along the road on the north side of the last-mentioned premises (which road is in the said plan coloured yellow), either with or without horses, cattle, carts, and carriages, the said [*purchaser*], his heirs and assigns (*o*), bearing the expense of keeping in repair one half of the said road, so far as it adjoins the last-mentioned premises; And, Secondly, All those freehold pieces or parcels of land, with the house and other buildings standing thereon, situate in the parish of [Y.], in the county of ——, all which last-mentioned hereditaments form part of the [Y.] Estate aforesaid, and are comprised (with other hereditaments) in the first part of the second schedule to the said —— Estates Act, 18—, and are particularly described in the first part of the second schedule to these presents, and are also delineated, with the boundaries and abuttals thereof, in the said plan, and therein coloured green;

Parcels.

(*n*) See as to these words, *post*, p. 448, note (*r*).

(*o*) The burden of keeping the road in repair would appear to devolve upon the assigns of the land and right of way, as the obligation is attached to the grant itself: see *ante*, pp. 296, *et seq.*

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And, Thirdly, All those several leasehold messuages, buildings, lands, and tenements, in the parish of ——, and county of —— aforesaid, all which same leasehold premises form part of the [Y.] Estate aforesaid, and are comprised in the second part of the second schedule to the said —— Estates Act, 18—, and are particularly described in the second part of the second schedule to these presents, and are also delineated with the boundaries and abuttals thereof respectively in the aforesaid plan and therein coloured blue respectively: To hold all the premises first and secondly hereby conveyed Unto and to the use of the said [*purchaser*], his heirs and assigns, subject to the several leases and tenancies affecting the same premises respectively; And to hold all the premises thirdly hereby conveyed unto the said [*purchaser*] absolutely, for all the residue now unexpired of the several leases mentioned in the second part of the second schedule to these presents under which the same premises are held respectively, and at the rents and subject to the covenants and conditions by and in the said leases reserved and contained, and on the part of the lessees to be paid, observed, and performed respectively, and also subject to the several underleases and tenancies affecting the premises thirdly hereby conveyed respectively; And as to all the premises hereby conveyed, freed, and discharged from the limitations, powers, and provisions of the settlement created by the hereinbefore recited will of the said Sir [A. B.], the grandfather, and from all estates, interests, and charges subsisting or to arise thereunder [*Covenant by purchaser to pay rents, &c., under several leases, ante*, p. 401; *Acknowledgment and undertaking by tenant for life as to title-deeds, ante*, p. 381].

The First Schedule above referred to.

[*Description of parts of* [X.] *Estate conveyed to purchaser.*]

The Second Schedule above referred to.

[*Description of parts of* [Y.] *Estate conveyed to purchaser.*]

First part [*Freeholds*].

Second part [*Leaseholds*].

The Third Schedule above referred to.

[*Enumeration of title-deeds, &c., retained by vendor.*]

XXIX. *CONVEYANCE of* COPYHOLDS *by a* TENANT FOR LIFE *under the Settled Land Act*, 1882.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*trustee*], of, &c., and [*trustee*], of, &c., of the first part; [*tenant for life*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part: WHEREAS, by a surrender made in the manor of ——, in the county of ——, on the —— day of ——, 18—, the hereditaments hereinafter described (together with other hereditaments) were surrendered to the use of [*testator*], his heirs and assigns, at the will of the lord, according to the custom of the said manor, under the rents, suits, and services therefor due and of right accustomed: AND WHEREAS at a court held in and for the said manor on the —— day of ——, 18—, the said [*testator*] was duly admitted tenant of the said hereditaments: AND WHEREAS the said [*testator*] duly made his last will dated the —— day of ——, 18—, and after certain legacies therein mentioned gave, devised, and bequeathed all the residue and remainder of his estate, property, and effects, with their appurtenances, unto [*trustees of will*], their heirs, executors, administrators, and assigns, Upon trust that his said trustees, and the survivor of them, and the heirs, executors, or administrators of such survivor, should permit and suffer his son, the said [*tenant for life*], during his life, to have, receive, and take the yearly rents, issues, and profits of all those his seven copyhold messuages or dwelling-houses, with the land and appurtenances thereto belonging, situate in ——, in the county of —— (which seven messuages are the hereditaments hereinafter described and hereby conveyed), and after the decease of the said [*tenant for life*] the testator directed his said trustees and the survivor of them, and the heirs, executors, and administrators of such survivors, to stand seised of these hereditaments for the children of the said [*tenant for life*] in equal shares, and their respective heirs and assigns, and in case any one or more of such children, being a son, should die under the age of twenty-one years, or being a daughter, should die under that age and unmarried, then as well the original share or shares of him, her, or them, on the death of any other or others of such children, should accrue to the survivors or

Parties.

Recitals: of surrender of copyholds;

of admittance of testator;

of devise of copyholds;

XXIX. **Conveyance of Copyholds by Tenant for Life under Settled Land Act, 1882.**

survivor or other or others of such children, in equal shares as tenants in common; And the said [*testator*] appointed the said [*trustees of will*] to be the executors of his will: And whereas the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, which was proved by the said executors in the Prerogative Court of the Archbishop of ——, on the —— day of ——, 18—:

of death of testator;

of deaths of trustees of will;

And whereas the said [*one of the trustees of will*] died on the —— day of ——, 18—: And whereas the said [*other trustee of will*] died on the —— day of ——, 18—, without having devised the estates vested in him as trustee (*o*): And whereas by an order of the Chancery Division of Her Majesty's High Court of Justice, made on the —— day of ——, 18—, in the matter of the will of the said [*testator*], the Court thereby appointed the said [*trustees*] trustees of the said will in substitution for the said [*trustees of will*], and it was ordered that the copyhold hereditaments subject to the trusts of the said will should vest in the said [*trustees*] for the estate of the heir of the said [*last surviving trustee of will*], according to the custom of the said manor, upon the trusts of the said will or such of them as were then subsisting or capable of taking effect:

of appointment of new trustees by Court and vesting order;

of admittance of trustees;

And whereas on the —— day of ——, 18—, the said [*trustees*] were duly admitted tenants of the hereditaments comprised in the said surrender of the —— day of ——, 18—, according to the custom of the said manor:

of order appointing "trustees of settlement" under Settled Land Act, 1882;

And whereas by an order of the Chancery Division of Her Majesty's High Court of Justice, made on the —— day of ——, 18—, in the matter of the estate settled by the will of [*testator*], wherein the said [*tenant for life*] and others were plaintiffs, and the said [*trustees*] were defendants, upon the application of the said [*tenant for life*] and others, the Court ordered that the said [*trustees*] should be appointed trustees of the said will for the purposes of the Settled Land Act, 1882:

of agreement for sale of copyholds.

And whereas the said [*tenant for life*], as tenant for life under the said will of the hereditaments hereinafter described, and in exercise of the power vested in him in this behalf by the Settled Land Act, 1882, has agreed to sell to the said [*purchaser*], at the price of £——, the heredita-

(*o*) If this trustee had died after the 31st of December, 1881, this recital would of course be unnecessary, and should be omitted: see *ante*, p. 33.

XXIX. Conveyance of Copyholds by Tenant for Life under Settled Land Act, 1882.

ments hereinafter described, and the inheritance thereof in fee simple, according to the custom of the said manor, and under the usual rents, suits, and services: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [*trustees*], by the direction of the said [*tenant for life*], of which sum of £—— the said [*trustees*] hereby acknowledge the receipt, the said [*tenant for life*] hereby, as beneficial owner, conveys (*p*) unto the said [*purchaser*] ALL THOSE the seven copyhold messuages or dwelling-houses, with the land and appurtenances thereto, situate in —— aforesaid, comprised and described in the hereinbefore-recited will of the said [*testator*] deceased, and now better known by the description following (that is to say), All those seven messuages or dwelling-houses, with the land and appurtenances thereunto belonging, situate in —— Street, in ——, in the county of —— aforesaid, one of the said messuages being to the front of —— Street, and therein numbered 94, and the other six being in a court immediately behind the said front house formerly called —— Buildings, but now called —— Court, the said six houses being numbered 1, 3, 5, 7, 9, and 11 in the said court, the same piece of land being delineated in the plan drawn on these presents, and surrounded with a red boundary line, TO HOLD the said premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, at the will of the lord of the said manor, according to the custom of the said manor, by and under the suits, rents, and services therefor due and of right accustomed, freed and discharged, &c. [*ut ante*, p. 435].

IN WITNESS, &c.

(*p*) As to the operation of this deed, see Settled Land Act, 1882, sect. 20 (3), and *ante*, p. 49. As to the fines payable on admittance without surrender under a conveyance by a tenant for life, see *Re Naylor and Spendla's Contract*, 34 Ch. D. 217.

XXX. *CONVEYANCE by* TENANT FOR LIFE *under Settled Land Act,* 1882, *of* EASEMENTS *theretofore enjoyed with part of Settled Land* (*pp*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*tenant for life*], of, &c., of the first part; [*trustees*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part:

Recitals: as to right of light, &c.;

WHEREAS the owners and occupiers of the messuages and hereditaments hereinafter described are entitled to and have always enjoyed the right of free and uninterrupted access of light and air to certain ancient windows in the southern wall of such messuages;

as to right of way;

AND WHEREAS by an indenture, dated, &c., and made, &c., the right of way hereinafter described was, amongst other hereditaments, granted unto [*settlor*], his heirs and assigns;

as to title of tenant for life.

AND WHEREAS [*recite settlement, showing that it was made before the commencement of the Settled Land Act,* 1882, *and that the trustees thereof are trustees with power of sale, or with power to consent, &c., to a sale, and that the tenant for life is tenant for life thereunder*]; AND WHEREAS the said [*tenant for life*], as such tenant for life as aforesaid, has agreed with the said [*purchaser*] for the sale to him of the easements and hereditaments hereinafter conveyed at the price of £—— [*agreement for acknowledgment and undertaking as to title-deeds*].

Testatum.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*trustees*] by the said [*purchaser*], of which sum of £—— the said [*trustees*] and the said [*tenant for life*] hereby acknowledge the receipt and payment in manner aforesaid respectively, the said [*tenant for life*], by virtue and in exercise of the powers conferred upon him by the Settled Land Act, 1882, and of every or any other power enabling him in that behalf,

Conveyance.

hereby as beneficial owner conveys unto the said [*purchaser*], FIRSTLY, ALL that easement or right to the free and uninterrupted access of light and air to the several windows in the southern side of the several messuages or tenements situate and being in —— Street, in the parish of ——, in the county of ——, and abutting upon a yard in the same parish, the property of the said [*purchaser*], all which mes-

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(*pp*) See as to easements, *post*, p. 538, note (*x*), and p. 549, note (*z*).

XXX. Conveyance of Easements by Tenant for Life under Settled Land Act, 1882.

suages with their abuttals upon the said yard and the said yard are more particularly delineated in the map or plan thereof drawn in the margin of these presents, and are therein distinguished as to the said messuages by the colour ——, and as to the said yard by the colour —— ——; And secondly, All that the easement or right of way for ingress, egress, and regress for horses, carriages, carts, and waggons, and for all manner of cattle and persons on foot, from the point in the said map or plan marked with the letter A., upon and over the said yard to the road or street in the said parish of —— known as the —— Street, To hold all the premises unto and to the use of the said [*purchaser*], his heirs and assigns, to the intent that the said easements or rights to light and of way may henceforth cease and be extinguished.—[*Add, if desired, proviso restricting covenants for title on the part of the tenant for life, ante*, p. 435; *and acknowledgment and undertaking as to title-deeds, ante*, p. 381.]

XXXI. *CONVEYANCE by* Tenant for Life, *with leave of the Court under the Settled Land Acts*, 1882 *and* 1884, *of Lands settled upon* Trust for Sale (*q*).

THIS INDENTURE, made the —— day of ——, 18—, Between [*tenant for life*], of, &c., of the first part; [*trustees*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part: Whereas [*testator*], late of, &c., deceased, duly made his will dated, &c., and thereby devised (amongst other hereditaments) the lands and hereditaments hereby conveyed unto and to the use of [*trustees*], their heirs and assigns, upon trust that the said trustees, or the survivors or survivor of them, or the heirs of such survivor should, with such consents or at such discretion as therein mentioned, sell the same in manner therein mentioned, and should stand possessed of the net moneys to arise from any such sale as therein mentioned, Upon trust for the said [*tenant for life*] during his life, and after his death upon such trusts as are

Parties.

Recitals: of devise of lands on trust for sale;

(*q*) See Settled Land Act, 1882, sect. 63, and Settled Land Act, 1884, sect. 7.

XXXI. Conveyance of Lands Settled on Trust for Sale, under Settled Land Acts.

therein mentioned; AND WHEREAS [*recite death of testator, and probate of his will*]; AND WHEREAS [*recite order of Court appointing trustees of will to be trustees of the settlement for the purposes of the Settled Land Acts*]; AND WHEREAS by another Order of the Chancery Division of her Majesty's High Court of Justice, dated, &c., and made by ——, In the matter, &c., it was ordered that the said [*tenant for life*] be at liberty to exercise, in respect to the lands and hereditaments comprised in the said settlement, the powers of sale and conveyance conferred by the 63rd section of the Settled Land Act, 1882; AND WHEREAS the said [*tenant for life*], in exercise of the powers conferred upon him by the Settled Land Act, 1882, and the Settled Land Act, 1884, and by the hereinafter recited order of the —— day of ——, 18—, has agreed with the said [*purchaser*] for the sale to him of the said lands and hereditaments hereby conveyed and the inheritance thereof in fee simple in possession, at the price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*trustees*] by the said [*purchaser*], of which sum of £—— the said [*trustees*] and the said [*tenant for life*] hereby acknowledge the receipt and payment in manner aforesaid respectively, the said [*tenant for life*], by virtue and in exercise of the powers conferred on him by the 63rd section of the Settled Land Act, 1882, and the hereinbefore recited order of the —— day of ——, 18—, hereby as beneficial owner conveys, and the said [*trustees*] (*r*) do hereby as trustees convey unto the said [*purchaser*] and his heirs, ALL THAT [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, Freed and discharged, &c. (*ut ante*, p. 435).

of order giving leave for sale;

of agreement for sale.

IN WITNESS, &c.

(*r*) By sect. 20 of the Act of 1882, the tenant for life has a statutory power to convey the land discharged from the limitations, &c., of the settlement; and his conveyance would therefore appear to be sufficient to vest the legal estate in the purchaser, without the conveyance by the trustees; but when the trustees are willing to join for the purpose of conveying as well as of acknowledging the receipt of the purchase-money, it may be well for the purchaser to obtain a conveyance from them, so as to provide against any possible question as to the effect of the conveyance by the tenant for life alone.

XXXII. *CONVEYANCE in* FEE *of* FREEHOLDS *by a* TENANT *by the* CURTESY (*s*), *with the* CONSENT *of an* ASSIGNEE FOR VALUE *of the Life Estate* (*t*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*tenant by the curtesy*], of, &c., of the first part; [*mortgagee*], of, &c., of the second part; [*trustee*], of, &c., and [*trustee*], of, &c., of the third part; and [*purchaser*], of, &c., of the fourth part: WHEREAS [*testator*], late of, &c., deceased, duly made his will, dated, &c., and thereby, after specifically devising certain lands and hereditaments which did not include the lands and hereditaments hereby conveyed, gave, devised, and bequeathed all the rest, residue, and remainder of his real and personal estate, whatsoever and wheresoever situate, unto his daughter [A. B.], the wife (*u*) of the said [*tenant by the curtesy*], and her heirs and assigns: AND WHEREAS [*recite death and seisin of testator, and probate of his will, ut ante*, p. 422]: AND WHEREAS there was issue of the marriage between the said [A. B.] and the said [*tenant by the curtesy*], one child only, namely [C. B.]: AND WHEREAS the said [A. B.] died on the —— day of ——, 18—, intestate: And the said [C. B.] died on the —— day of ——, 18—, without having attained the age of twenty-one years, and without having been married: AND WHEREAS, by an indenture of mortgage dated, &c., and made, &c., the said [*tenant by the curtesy*] conveyed (*x*) the said hereditaments hereinafter described unto and to the use of the said [*mortgagee*] for the life of the said [*tenant by the curtesy*], by way of mortgage to secure to the said [*mortgagee*] the payment to him, on the —— day of —— then next, the sum of £—— with interest as therein mentioned: AND WHEREAS, by an order of the Chancery

Parties.

Recitals: of deaths of wife and child;

of mortgage;

of appointment of

(*s*) See Settled Land Act, 1882, sect. 58 (1) (viii), and Settled Land Act, 1884, sect. 8.

(*t*) See sect. 50 of the Act of 1882, and see note (*z*) to this precedent, *infra*.

(*u*) In the events described in the text, the heir of the wife must be sought amongst her relatives, the husband having no more than an estate by the curtesy. No succession duty would seem to be payable in respect of the deceased infant's succession, as the husband's estate would of necessity preclude the infant from obtaining the beneficial enjoyment; in which respect the case differs from *Att.-Gen.* v. *Hallett*, 2 H. & N. 368.

(*x*) Mortgages of life estates are often effected by demise, in which case this recital would require variation; and the mortgagee would surrender the term in the operative part.

XXXII. **Conveyance in Fee by Tenant in Curtesy.**

Division of Her Majesty's High Court of Justice, made in the matter of, &c., and in the matter of the Settled Land Acts, 1882 and 1884, (*y*), by Mr. Justice M., on the —— day of ——, 18—, the said [*trustees*] were appointed to be trustees of the settlement created by the said will: AND WHEREAS the said [*tenant by the curtesy*] has agreed with the said [*purchaser*] for the sale to him of the said lands and hereditaments in fee simple in possession free from incumbrances, at the price of £——: And the said [*mortgagee*] has agreed to concur in these presents for the purpose and in manner hereinafter appearing, to the intent that the said purchase-money may become subject to the said mortgage in substitution for the said lands and hereditaments hereby conveyed: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*], by the direction of the said [*tenant by the curtesy*], and with the consent of the said [*mortgagee*], testified by their executing these presents respectively, to the said [*trustees*], of which sum of £—— the said [*trustees*] and the said [*tenant by the curtesy*] and [*mortgagee*] hereby acknowledge the receipt and payment as aforesaid respectively, the said [*tenant by the curtesy*], with the consent of the said [*mortgagee*], testified as aforesaid (*z*), hereby as beneficial owner conveys, and the said [*mortgagee*] hereby as mortgagee conveys and confirms, unto the said [*purchaser*] and his heirs ALL THAT [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, Freed and discharged from all right and equity of redemption and all claims and demands heretofore subsisting therein, under or by virtue of the said mortgage: And also freed and discharged, &c. [*ante*, *p.* 435].

IN WITNESS, &c.

trustees of settlement by Court; of agreement for sale.

Testatum.

(*y*) By sect. 8 of the Settled Land Act, 1884, the settlement under which a tenant by the curtesy is tenant for life is to be deemed to have been made by his wife.

(*z*) By sect. 50 (3) of the Act of 1882 the powers of a "tenant for life" are not to prejudice the rights of an assignee for value of his estate or interest, and, in that case, the assignee's rights are not to be affected without his consent. The mere consent of the assignee would not, however, in the present case seem to be sufficient without a conveyance by way of confirmation on his part, see sect. 20, sub-sect. 2 (ii.); his security will attach to the purchase-money in the hands of the trustees, and the investments thereof: see sect. 22, sub-sect. 5.

XXXIII. *CONVEYANCE to the* USES *of a* SETTLEMENT *on* PURCHASE *under Settled Land Act*, 1882, *of* FREEHOLD REVERSION *on Leaseholds forming part of the Settled Lands.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the first part; [*tenant for life*], of, &c., of the second part; and [*trustees*], of, &c., and [*trustee*] of, &c., of the third part: WHEREAS the said [*vendor*] is seised of or entitled to the fee simple, free from incumbrances, of the lands and hereditaments hereby conveyed, but subject to the several leases specified in the Schedule hereunder written, and to the respective terms of years thereby created; AND WHEREAS (*a*) by an indenture, dated, &c., and made, &c., certain freehold lands and hereditaments therein mentioned were granted and assured unto the said [*trustees*] and their heirs to the use of the said [*tenant for life*] during his life, with remainders over: And by the same indenture the lands and hereditaments comprised in and demised by the said several leases specified in the said Schedule hereunder written, were assigned unto the said [*trustees*], their executors, administrators, and assigns, to hold all the same premises unto the said [*trustees*], their executors, administrators, and assigns, for all the respective residues of the several terms of years, at the rents and subject to the covenants on the part of the several lessees and conditions in and by the several leases specified in the said Schedule hereunder written respectively reserved and contained upon trust that they the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, their or his assigns, should, out of the rents and profits of the same premises, pay the said rents respectively, and should perform and observe the said covenants and conditions respectively, and subject thereto Upon such trusts and with and

Parties.

Recitals: of vendor's title;

of settlement under which purchaser is tenant for life;

(*a*) If this settlement be a settlement by way of trust for sale, the powers given by the Act of 1882 are exercisable by the tenant for life only by the leave of the Court; but, provided the leave be obtained, the power of investing the proceeds of a sale by the tenant for life, or by the trustees under their trust, is exercisable by the tenant for life, whether the trusts on which, under the settlement, the proceeds of sale are to be held contemplate investment in real estate or not.

XXXIV. **Conveyance of Copyholds and Leaseholds to Trustees of a Settlement under the Settled Land Act, 1882.**

same unto the said [*vendor*], his heirs and assigns, according to the custom of the said manor, at and under the rents, fines, suits, and services therefor due and of right accustomed: AND WHEREAS by an indenture of lease, dated, &c., and made, &c., All that, &c. [*describe parcels from lease*] were demised unto [*original lessee*], his executors, administrators, and assigns, from the —— day of ——, 18—, for the term of —— years, at a yearly rent of £——, and subject to certain covenants and conditions in the indenture now in recital contained, and on the part of the lessee to be performed and observed: AND WHEREAS by divers mesne assignments or acts in the law, and ultimately by an indenture dated, &c., and made, &c., all the premises comprised in the hereinbefore-recited indenture of lease have become and now are vested in the said [*vendor*] for the residue of the said term of —— years: AND WHEREAS by an indenture, dated, &c., and made, &c., [*recite settlement showing the title of the tenant for life and of the trustees*]: AND WHEREAS the said [*tenant for life*] sold certain mines and minerals with certain easements or rights of way and water necessary for the working thereof, and in pursuance of an order of the Chancery Division of Her Majesty's High Court of Justice, made on the —— day of ——, in the matter, &c., the proceeds of the said sale were on the —— day of —— duly paid into Court: AND WHEREAS [*recite contract for purchase, ut ante*, p. 452]: AND WHEREAS upon the treaty for the said purchase it was agreed that the said purchase-money of £—— should be provided for by an order of court in that behalf (*d*) to be forthwith obtained: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— so to be paid to the said [*vendor*] (*e*) as aforesaid, the said [*vendor*] by the direc-

of vendor's title to leaseholds;

of settlement.

Testatum.

Covenant to surrender copyholds.

(*d*) In the case of investment in land of funds in Court in ordinary cases, it was the practice of the Court not to direct payment out until the conveyance had been executed. The orders and rules made under the Settled Land Act, 1882, appear to contain no provisions in this respect, and it would therefore seem that the practice will be the same in the case of the investment of moneys arising under the Settled Land Act, 1882, as in other cases.

(*e*) The purchaser must take care that the proper receipt for the purchase-money is endorsed upon the conveyance, upon the payment of the money pursuant to the order, when obtained.

XXXIV. **Conveyance of Copyholds and Leaseholds to Trustees of a Settlement under the Settled Land Act, 1882.**

tion of the said [*tenant for life*] hereby covenants with the said [*trustees*] that he the said [*vendor*] will forthwith, at the cost of the said [*trustees*], their heirs and assigns, surrender into the hands of the lord or lady of the said manor of ——, in the county of ——, according to the custom of the said manor, and hereby as beneficial owner conveys unto the said [*trustees*] ALL that [*describe parcels according to the description on the Court Rolls*], TO THE USE of the said [*trustees*], their heirs and assigns, according to the custom of the said manor, and at and under the rents, fines, heriots, suits, and services therefor due and of right accustomed, Nevertheless upon such trusts and subject to such powers and provisions hereinafter declared of and concerning the same: AND it is hereby agreed and declared, that until the surrender of the said premises hereinbefore covenanted to be surrendered in accordance with the covenant in that behalf hereinbefore contained, the said [*vendor*] and his heirs shall stand seised thereof upon trust for the surrender thereof, pursuant to such covenant and subject thereto upon the trusts and subject to the powers and provisions hereinafter declared of and concerning the same. AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said [*vendor*], by the direction of the said [*tenant for life*] hereby assigns, and as beneficial owner, conveys unto the said [*trustees*] ALL those the said lands and hereditaments comprised in and demised by the hereinbefore-recited indenture of lease, TO HOLD all the same premises UNTO the said [*trustees*], their executors, administrators, and assigns, for the residue of the said term of —— years, at the rent and subject to the covenants and conditions by and in the hereinbefore-recited indenture of lease reserved and contained, and by the lessee henceforth to be paid, performed, and observed, Nevertheless upon the trusts and subject to the powers and provisions hereinafter declared of and concerning the same: And it is hereby declared that the said [*trustees*], and their heirs, executors, and assigns, shall stand possessed of the said lands and hereditaments hereinbefore covenanted to be surrendered when the same shall have been surrendered in pursuance to the covenant in that behalf hereinbefore contained, and also of the said lands and hereditaments hereby assigned and conveyed, upon such trusts and subject to such powers and provisions corre-

Habendum.

Declaration of trust as to copyholds until surrender.

Further *testatum.*

Assignment of leaseholds.

Habendum.

Declaration of uses and trusts of purchased property.

XXXIV. Conveyance of Copyholds and Leaseholds to Trustees of a Settlement under the Settled Land Act, 1882.

sponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions which, under the said indenture of settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the said freehold lands and hereditaments comprised in and settled by the hereinbefore-recited indenture of settlement, but not so as to increase or multiply charges or powers of charging, But so nevertheless that the beneficial interest in the said lands and hereditaments hereby assigned and conveyed shall not vest absolutely in any person who is by the hereinbefore-recited indenture of settlement made tenant in tail by purchase, and who dies under the age of twenty-one years, but shall on the death of that person under that age go as the said freehold lands and hereditaments comprised in and settled by the hereinbefore-recited indenture of settlement would go.

In witness, &c.

XXXV. *CONVEYANCE by* Mortgagee *in fee selling under an express* Power of Sale. (*In note, express* Covenant *against* Incumbrances *by mortgagee.*)

Parties.

Recitals: of mortgage;

THIS INDENTURE, made the —— day of ——, 18—, Between [*mortgagee*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: Whereas, by an indenture dated, &c., and made, &c., the hereditaments hereinafter conveyed (with other hereditaments) were assured to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso for redemption thereof, on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £——, with interest thereon at the rate of —— per cent. per annum, on the —— day of —— then next; And it was by the same indenture declared that it should be lawful for the said [*mortgagee*], at any time after the said —— day of —— then next, without any further consent on the part of

XXXV. Conveyance by Mortgagee under Express Power of Sale.

the said [*mortgagor*], his heirs or assigns, to sell and dispose of, &c. [*set out the power to sell, convey, and give receipts, and such other of the ancillary clauses as will be useful in explaining the present conveyance, such as the clause protecting purchasers, &c.*]: And whereas the said [*mortgagee*], in exercise of the power in that behalf contained in the said indenture of mortgage, has contracted for the sale to the said [*purchaser*] of the fee simple in possession of the said hereditaments hereinafter conveyed, at the price of £——. Now this Indenture Witnesseth that, in pursuance of the said agreement, and for effectuating the said sale, and in consideration of the sum of £—— paid by the said [*purchaser*] to the said [*mortgagee*], the receipt whereof the said [*mortgagee*] hereby acknowledges, the said [*mortgagee*] hereby grants, and as mortgagee (*f*) conveys unto the said [*purchaser*] and his heirs, All that, &c. [*describe parcels*], To hold all the premises Unto and to the use of the said [*purchaser*], his heirs and assigns, Discharged from all right and equity of redemption, and all claims and demands, principal moneys and interest secured by, and under or by virtue of the said indenture of mortgage.

of contract for sale.

Testatum.

Conveyance.

Parcels.

Habendum.

In witness, &c.

XXXVI. *Conveyance by* Transferee of a Mortgage *selling under the* Statutory power *in the Conveyancing and Law of Property Act*, 1881 (*by Supplemental Deed*).

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of the one part, and [*purchaser*], of the

Parties.

(*f*) Mortgagees, as well as trustees, give no covenant for title, except that they have not incumbered. If an express covenant should appear desirable, it will take the following form :—

"And the said [*mortgagee*] hereby covenants with the said [*purchaser*] that he the said [*mortgagee*] has not done or knowingly suffered, or been party or privy to anything whereby the premises hereinbefore conveyed, or any of them, or any part thereof, are, is, or may be impeached, affected, or

Covenant against incumbrances.

XXXVI. **Conveyance by Transferee of Mortgage under Statutory Power of Sale.**

other part: And supplemental to an indenture of mortgage, dated the —— day of ——, 1882, and made between [*mortgagor*], of the one part, and [*mortgagee*], of the other part, whereby the messuages, lands and hereditaments hereinafter described and hereby conveyed were assured to and to the use of the said [*mortgagee*] his heirs and assigns, by way of mortgage for securing payment to the said [*mortgagee*] on the —— day of ——, 18—, of the sum of 10,000*l.*, with interest; And also supplemental to an indenture of transfer to the said [*vendor*] of the said mortgage, dated, &c., and made between the said [*mortgagee*], of the one part, and the said [*vendor*], of the other part, WITNESSETH that, in consideration of the sum of £——, paid to the said [*vendor*] by the said [*purchaser*], the receipt whereof the said [*vendor*] hereby acknowledges, the said [*vendor*], in exercise of the power (*g*) in that behalf conferred upon him by the Conveyancing and Law of Property Act, 1881, and of every or any other power him thereunto enabling, hereby grants, and, as mortgagee, conveys to the said [*purchaser*] and his heirs All that [*describe parcels*]: To hold all the premises Unto and to the use of the said [*purchaser*] his heirs and assigns, Discharged from all right or equity of redemption, and all principal moneys and interest secured by, and claims and demands heretofore subsisting therein, under the said indenture of mortgage.

In witness, &c.

Supplemental to mortgage;

and to transfer of mortgage;

Testatum.

Conveyance.

Parcels.

Habendum.

Fund from mortgage.

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incumbered, in title, estate, or otherwise howsoever, or whereby he is prevented from conveying the same premises, or any part thereof, in manner hereinbefore appearing."

(*g*) The operation of the 19th section of the Act is discussed *ante*, Vol. III., sub tit. Mortgages, at pp. 919 *et seq.*; and that passage should be consulted. The power should be referred to in the operative part of the deed, as should also every power on every occasion when a power is being exercised.

XXXVII. *CONVEYANCE of an* EQUITY *of* REDEMPTION (*h*), *with* COVENANT *by the* PURCHASER *to* PAY *the* MORTGAGE DEBT *and* INDEMNIFY *the* VENDOR.

THIS INDENTURE, made, &c., BETWEEN [*vendor*], of, &c., of the one part; and [*purchaser*], of, &c., of the other Parties.

(*h*) The following precautions should be taken by the purchaser of an equity of redemption:—1st. To ascertain, by communication with the mortgagee, that the state of the account between him and the mortgagor is correctly represented by the latter. 2ndly. To obtain the mortgagee's assurance that he has received no notice of any other incumbrance. 3rdly. To give to the mortgagee notice of the purchase. As regards the first two precautions here recommended, although the mortgagee is not bound to give the information, yet his refusal would of course excite suspicion. The consequences of not giving to the mortgagee notice of the conveyance may be serious, as the mortgagee, having the legal estate, may, in ignorance of the sale, make further advances to the mortgagor on the security of the land, which advances would bind the land in the hands of the purchaser: see *Goddard* v. *Complin*, 1 Ch. Ca. 119; *Blackston* v. *Moreland*, 2 Ch. Ca. 20; *Wrightson* v. *Hudson*, 2 Eq. Ca. Abr.; *Vint* v. *Padgett*, 2 De G. & J. 611; see also Dart. V. & P. 693. Precautions to be taken by the purchaser of an equity of redemption.

It will also be prudent to ascertain that the mortgagee has no mortgage on any other estate of the mortgagor; and that the mortgagor has not made any mortgage of any other estate to any other person, as the mortgagee of the estate purchased may acquire the charge on such other estate and consolidate: *vide ante*, Vol. III., sub tit. MORTGAGES, pp. 936 *et seq.* The position of a purchaser of an equity of redemption, which formerly was very precarious, owing to the doctrine of consolidation (see *Beevor* v. *Lack*, L. R. 4 Eq. 546), is much improved, so far as regards the equity of redemption under mortgages created subsequently to 31st December, 1881: see Conveyancing and Law of Property Act, 1881, sect. 17, and *ante*, Vol. III., p. 940. It is, however, still necessary, in dealing with property mortgaged before that date, to make all the inquiries and take all the precautions suggested above. And, even as regards equities of redemption, which come within the statute, it must be seen that the mortgagee has not, under his security, express right to consolidate: see sect. 17, sub-sect. (2).

It is usual, in transferring an interest of this nature, to employ that mode of conveyance which would be proper to pass the mortgagor's estate, supposing it to be a legal and not an equitable interest. Thus, a mortgagor of freehold lands generally conveys by way of grant (for which purpose the use of the word "grant" is not necessary: see *ante*, p. 162) and of leaseholds by assignment, though the mortgages, if they have taken effect, will, in both instances, have exhausted the whole legal ownership. The univer- As to conveyances of equities of redemption.

XXXVII. **Conveyance of Equity of Redemption in Fee.**

part: WHEREAS by an indenture of mortgage dated the —— day of ——, 18—, and made between the said [*vendor*], of the one part; and [*mortgagee*], of, &c., of the other part; in consideration of the sum of £—— to the said [*vendor*] paid by the said [*mortgagee*], the said [*vendor*] covenanted with the said [*mortgagee*] to pay to him on the —— day of ——, 18—, the sum of £—— with interest thereon in the meantime at the rate of —— per cent. per annum, and also so long after that date as any principal money should remain due thereunder, to pay to him interest thereon at the rate aforesaid by equal half-yearly payments on the —— day of —— and the —— day of —— in every year; And by the indenture now in recital the said [*vendor*] granted unto the said [*mortgagee*], and his heirs, the hereditaments hereinafter conveyed with their appurtenances, To hold the same unto and to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso for redemption of the said hereditaments upon payment by the said [*vendor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £—— and interest, on the —— day of —— then next ensuing; AND WHEREAS the said principal sum of £—— still remains owing upon the aforesaid security, but all interest in respect thereof has been duly paid up to the ——

Recital of mortgage.

Money due.

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sality of the practice, however, of treating an equity of redemption as the land itself, for the purposes in question, should not interfere with a correct view of the actual nature of the property, which is nothing more than the right (though often a valuable one, no doubt) to call upon the mortgagee to convey the legal estate on payment of the mortgage debt; and this right may pass by any instrument capable of operating as an equitable transfer.

If, therefore, the purchaser of an equity of redemption has a written contract, which would be binding on the vendor in equity, he has all which the vendor can transfer to him, and the subsequent more formal conveyance usually taken is superfluous: see *Staines* v. *Morris*, 1 Ves. & B. 8. It is probable, however, that the purchaser would not be entitled to make use of the contract to enforce the equity of redemption against the mortgagee, unless it were stamped as a "conveyance;" and the contract often does not show the payment of the purchase-money. The vendor would, it should seem, also be entitled to call upon the purchaser to enter into a covenant for payment of the mortgage-money, and would himself be bound to enter into covenants for the title. For some of these purposes a further *deed* between the parties is requisite; for all of them it is convenient.

XXXVII. **Conveyance of Equity of Redemption in Fee.**

day of —— last past (*i*); AND WHEREAS the said [*purchaser*] has contracted with the said [*vendor*] for the purchase of the said hereditaments in fee simple (subject nevertheless to the said principal sum of £—— and interest secured by the said indenture of mortgage), at the price of £——, which several sums of £—— and £—— make together the sum of £—— (*k*). NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], the receipt, &c., and in consideration of the covenant hereinafter contained on the part of the said [*purchaser*], the said [*vendor*] as beneficial owner hereby conveys (*l*) unto the said [*purchaser*] and his heirs, ALL THAT, &c. [*describe parcels*], TO HOLD all the premises (subject to the hereinbefore recited indenture of mortgage, and to the payment of the said principal sum of £——, and the interest now and hereafter to become due in respect thereof), UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns. And in consideration of the premises the said [*purchaser*] hereby covenants with the said [*vendor*], That the said [*purchaser*], his heirs, executors, administrators, or assigns, will pay unto the said [*mortgagee*], his executors, administrators, or assigns, the principal sum of £—— secured by the said indenture of mortgage, and all interest now and which hereafter shall accrue due in respect thereof; And that he, his heirs, executors, administrators, and assigns will, at all times hereafter, effectually indemnify the said [*vendor*], his heirs, executors, and administrators, against the said principal sum of £——, and all interest thereon, and against all actions, proceedings, claims, demands, and liability, for or by reason of the non-payment thereof (*m*).

Contract for purchase subject to mortgage.

Testatum.

Consideration.

Grant.

Parcels.

Habendum.

Purchaser covenants:

to pay the mortgage-money;

and to indemnify vendor therefrom.

IN WITNESS, &c.

(*i*) The purchaser will, of course, ascertain this fact.

(*k*) This is the sum on which the *ad valorem* duty must be paid: see sect. 73 of the Stamp Act, 1870, *ante*, p. 370.

(*l*) As the vendor has not the legal estate, it would seem that the benefit of the statutory covenants for title here implied will not run with the land.

(*m*) Though it should seem that a vendor is entitled to a covenant of this nature, yet, independently of express contract, the purchaser of an equity of redemption would be bound to indemnify the vendor against the mortgage debt; for, having become owner of the estate, equity raises in him an obligation to take on himself

Purchaser of equity of redemption bound to pay mortgage debt.

XXXVIII. *RELEASE by* MORTGAGOR *to* MORTGAGEE *of the* EQUITY OF REDEMPTION *of* FREEHOLDS INDORSED *on the* MORTGAGE DEED.

THIS INDENTURE, made the —— day of ——, 18—,
Parties. BETWEEN the within-named [*mortgagor*] of the one part, and
Recitals: the within-named [*mortgagee*] of the other part: WHEREAS
of default; the within-mentioned principal sum of £—— and an arrear of interest amounting to the sum of £——, now remain due and owing from the said [*mortgagor*] to the said [*mortgagee*]
of agreement for purchase. upon the within-mentioned security: AND WHEREAS the said [*mortgagor*], in consideration of the sum of £——, for principal and interest, and of the payment by the said [*mortgagee*] to the said [*mortgagor*] of the sum of £——, which several sums of £—— and £—— together make the sum of £—— (*n*), hath agreed to release to the said [*mortgagee*] the equity of redemption of or in the within-
Testatum. mentioned messuages, &c.: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of £—— now paid by the said [*mortgagee*] to the said [*mortgagor*], the receipt, &c., and of the release hereinafter contained by the said [*mortgagee*] to the said [*mortgagor*] of the said principal sum of £——, and of the said sum of £—— interest moneys so owing as aforesaid, the said [*mortgagor*] hereby releases,
Mortgagor releases equity and as beneficial owner conveys, unto the said [*mortgagee*]

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its burthens: *Waring* v. *Ward*, 7 Ves. 337. But where a covenant has been entered into, the purchaser's liability is regulated and fixed by the extent of such covenant. Upon this principle, it has been held that, where a purchaser had entered into a covenant with the vendor to pay a mortgage debt, to which a third person was liable as surety for the vendor, and the surety afterwards paid the debt, he could not maintain an action against the purchaser, who was only liable to be sued upon his covenant of indemnity with the vendor; though it was admitted that, if the mortgagor had simply transferred his interest to the purchaser, without any such covenant, the latter would have stood in his place as principal debtor, and the surety would have had the ordinary rights and remedies of a surety creditor against him: *Crafts* v. *Tritton*, 2 Moo. 411; 8 Taun. 365. Sometimes a separate deed of indemnity is taken from the purchaser, because the purchase-deed, which would otherwise contain the covenant, goes into the custody of the purchaser.

Stamp. (*n*) The *ad valorem* stamp must, of course, cover the whole purchase-money, including the principal and interest released.

and his heirs, All and singular the said messuages, lands, and hereditaments within-mentioned, To HOLD the within-mentioned hereditaments UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns, Discharged of and from all rights or equity of redemption whatsoever, under or by virtue of the within-written indenture: AND in consideration of the premises, the said [*mortgagee*] hereby releases the said [*mortgagor*], his heirs, executors, administrators, and assigns, from the said principal sum of £——, and all interest secured by the within-written indenture, and from all actions, proceedings, claims, demands, and liability in respect thereof or otherwise under the said indenture of mortgage (*o*).

XXXVIII. **Release of Equity of Redemption Indorsed.**

of redemption to mortgagee and his heirs.

Habendum.

IN WITNESS, &c.

XXXIX. *CONVEYANCE in* FEE *by* MORTGAGOR *and* MORTGAGEE *to* PURCHASER, *the Mortgage being paid off (by Supplemental Deed). Variation where the* MORTGAGE *is for a* TERM *which the Mortgagee* SURRENDERS.

THIS INDENTURE, made the —— day of ——, in the year ——, BETWEEN [*mortgagee*], of, &c. (*p*), of the first part;

Parties.

(*o*) If it is desired that the mortgage-debts should be kept on foot as a protection against mesne incumbrances, add here:—

Proviso that mortgage-debt shall not be merged.

"PROVIDED ALWAYS, and the said [*mortgagee*] hereby declares that the said principal sum of £——, and all interest henceforth to accrue due in respect thereof, shall not merge in the inheritance of the said hereditaments and premises hereby released, but shall remain and continue as a subsisting charge thereon, so as to be a protection against all mesne incumbrances, charges, estates, and claims whatsoever, if any such there be, and that accordingly the said [*mortgagee*], his executors, administrators, and assigns, shall be deemed to be trustees of the said principal and interest moneys and the security for the same in trust for the said [*mortgagee*], his heirs and assigns."

As to non-merger of a mortgage-debt on purchase by a mortgagee of the equity of redemption, see *Adams* v. *Angell*, 5 Ch. D. 634.

(*p*) In arranging the order of the parties to a deed, it is usual

XXXIX. **Conveyance in Fee by Mortgagor and Mortgagee.**

[*vendor*], of, &c., of the second part; [*purchaser*], of, &c., of the third part: AND SUPPLEMENTAL to an indenture of mortgage (*q*) dated the —— day of ——, 18—, and made between the said [*vendor*] of the one part, and the said [*mortgagee*] of the other part, for securing unto the said [*mortgagee*] the sum of 1000*l.*, with interest for the same, on the hereditaments hereinafter described and hereby conveyed: AND WHEREAS the said principal sum of 1000*l.* is now owing upon the security of the said indenture of mortgage, but all interest for the same has been paid up to the day of the date of these presents, as the said [*mortgagee*] doth hereby acknowledge: AND WHEREAS the said [*purchaser*] has agreed with the said [*vendor*] for the purchase of the inheritance in fee simple of the said hereditaments, for the price of 1500*l.*, out of which sum it has been agreed that the said sum of 1000*l.* owing to the said [*mortgagee*] as aforesaid shall be discharged: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 1000*l.* paid by the said [*purchaser*] (at the request and by the direction of the said [*vendor*]) to the said [*mortgagee*] (the receipt of which sum of 1000*l.* the said [*mortgagee*] hereby acknowledges); And also in consideration of the sum of 500*l.* paid by the said [*purchaser*] to the said [*vendor*], (the receipt of which sum of 500*l.*, and the payment of which said sum of 1000*l.*, in manner aforesaid, making together the said purchase-money of 1500*l.*, the said [*vendor*] hereby acknowledges); the said [*mortgagee*] as mortgagee, by the direction of the said [*vendor*] (*r*), hereby

Recitals: of money due on mortgage;

of contract for purchase.

Testatum. The mortgagee, in consideration of the mortgage money, and the mortgagor, in consideration of the remainder of the purchase-money, convey the estate to the purchaser in fee.

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to place persons having the legal estate before those who have equitable interests only, and persons having freehold estates before those who have chattel interests: see *ante*, p. 123.

(*q*) The mortgage-debt being wholly paid off out of the purchase-money, the mortgage-deed will be delivered over to the purchaser, and retained in his custody; there therefore is no objection to the conveyance being in the form of a supplemental deed. If, however, the mortgage-debt is not wholly paid off, but remains on the security of other property of the vendor, the mortgage-deed will continue in the possession of the mortgagee, and the conveyance to the purchaser should be by an independent deed reciting the mortgage: see next Precedent.

(*r*) If the mortgage is for a term, which is to be surrendered, substitute for the words "by the direction" to "as mortgagee," the following:—

Variation "And to the intent that the residue of the said term of ——

conveys, and the said [*vendor*] hereby as beneficial owner conveys and confirms unto the said [*purchaser*] and his heirs, ALL THAT, &c. [*describe parcels* (*s*)]; TO HOLD the premises hereinbefore conveyed UNTO AND TO THE USE OF the said [*purchaser*], his heirs and assigns, Discharged from all principal moneys and interest secured by, and all claims and demands under the said indenture of mortgage (*t*).

XXXIX. **Conveyance in Fee by Mortgagor and Mortgagee.**

Habendum to the vendee to uses to prevent dower.

IN WITNESS, &c.

XL. *CONVEYANCE of* FREEHOLDS *by a* MORTGAGOR *and the* EXECUTORS *of a deceased* MORTGAGEE *to a* PURCHASER *in Fee, where the whole of the* PURCHASE-MONEY *is* PAID *to the* MORTGAGOR. VARIATIONS *where part of the* PURCHASE-MONEY *is applied in* REDUCTION *of the* MORTGAGE DEBT (*u*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*heir at law of mortgagee*], of, &c., of the first

Parties (*x*).

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years created by the said indenture of mortgage may be merged in the reversion of the hereditaments hereby conveyed, the said [*mortgagee*] (by direction of the said [*vendor*], as beneficial owner), hereby assigns, surrenders and as mortgagee conveys; and the said [*vendor*], &c."

where mortgage is for a term.

The surrender is sometimes made by a separate *testatum*, but it is more usual, for the sake of brevity, to incorporate it with the conveyances, as in the text.

(*s*) If the premises are in the occupation of a tenant from year to year, say—

" which premises are now in the occupation of [A. B.], as tenant from year to year to the said [*vendor*]."

(*t*) A proviso against mergers of the mortgage-debt may here be inserted if desired: see *ante*, p. 463, note (*o*).

(*u*) By the 30th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the legal estate in trust and mortgaged freeholds vests in the personal representatives of a trustee or mortgagee dying after the commencement of the Act (the 1st of January, 1882), and they are accordingly competent to convey such legal estate to a purchaser without the concurrence of the heir-at-law, or his devisee of mortgage estates, notwithstanding any testamentary disposition to the contrary: see *ante*, p. 33, and Vol. III., p. 965, sub tit. MORTGAGES. This enactment, how-

Devolution of trust and mortgage estates.

Note (*x*) next page.

XL. Conveyance in Fee by Mortgagor and Executors of Mortgagee.

part]; [*executor*], of, &c., and [*executor*], of the first [*or* second] part; [*mortgagor*], of, &c., of the second [*or* third] part; and [*purchaser*], of, &c., of the third [*or* fourth] part: WHEREAS, by an indenture of mortgage dated, &c., and made between the said [*mortgagor*], of the one part, and [*mortgagee*], of the other part, the hereditaments hereinafter described and hereby conveyed were assured by way of mortgage unto the said [*mortgagee*] in fee simple, to secure to the said [*mortgagee*] payment of the sum of £—— and interest as therein mentioned: AND WHEREAS the said [*mortgagee*] duly made and executed his will, dated, &c., and thereby appointed the said [*executors*] to be the executors thereof, [but the said will contained no devise of estates vested in the testator by way of trust or under any mortgage (*y*)]: AND WHEREAS the said [*mortgagee*] died on the —— day of ——, 18—, [leaving the said [*heir at law*], his eldest son him surviving, *or* without leaving issue but leaving the said [*heir at law*], his brother and heir at law him surviving (*z*), and] without having revoked or altered his said will, which was on the —— day of ——, 18—, duly proved in the District Registry at —— of her Majesty's High Court of Justice, Probate Division, by the

Recitals:

of mortgage;

of will of mortgagee;

of death of mortgagee;

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ever, no longer applies to copyholds: see the Copyholds Act, 1887 (50 & 51 Vict. c. 73), sect. 45. By the 4th section of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), the legal personal representatives of a mortgagee of freeholds or copyholds to which the mortgagee has been admitted may convey or surrender the legal estate of the mortgaged property "on payment of all sums secured by the mortgage." This section is repealed by sect. 30 (2) of the Act of 1881, but the repeal is not retrospective; where, therefore, as in the present case, the mortgage-debt is not paid off, it will be necessary to make the heir at law or devisee of a testator who died before 1882 a party to convey the legal estate.

(*x*) As to arrangement of parties, see *ante*, p. 123. In this precedent the words enclosed in leaded brackets refer to cases where the testator died before 1882, and his heir at law concurs to convey the legal estate.

(*y*) If the will, being that of a testator who died before 1882, contained a devise of mortgaged estates, say, instead of the words in brackets:—

"And he also thereby devised all estates vested in him by way of trust, or under any mortgage, to the said [*executors*]" (*or to any other devisee, as the case may be*).

(*z*) Statements of law should not generally be made in recitals (see *ante*, p. 139), but, where the heir at law is a relative other than an eldest son, it is convenient to state that such relative is the heir at law.

XL. Conveyance in Fee by Mortgagor and Executors of Mortgagee.

said [*executors*]: AND WHEREAS the said [*executors*] have contracted with the said [*purchaser*] for the sale of the hereditaments hereinafter described and hereby conveyed in fee simple free from incumbrances, for the sum of £——, [and it has been agreed that the said [*heir at law*] shall concur in these presents for the purpose and in manner hereinafter appearing]: AND WHEREAS the said [*executors*], being satisfied that the said principal sum and interest secured by the hereinbefore recited indenture is amply secured by and on the property therein comprised other than the hereditaments hereinafter described and hereby conveyed, have agreed that the whole of the said purchase-money shall be paid to the said [*mortgagor*], and that they the said [*executors*] shall concur in these presents for the purpose and in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreements, and in consideration of the

of agreement for sale;

of agreement as to payment of purchase-money to mortgagor (*a*).

Testatum.

Consideration (*b*).

(*a*) Of course trustees or executors should be very careful as to the sufficiency of the remaining security before agreeing to such an arrangement, as they will undoubtedly incur responsibility by parting with part of the security without, at least, a proportionate reduction of the mortgage-debt. In the case of a sale of a piece of land, forming a small part of the mortgaged property, it is often inconvenient to mortgagees to receive the purchase-money in part payment of the mortgage-debt. If part of the purchase-money is to be applied in part payment of the mortgage-debt, substitute the following for the recital in the text:—

Variation.

"AND WHEREAS the said sum of £—— now remains due on the security of the hereinbefore recited indenture of mortgage, but all interest thereon has been paid up to the date of these presents; AND WHEREAS it has been agreed that the sum of £——, part of the said purchase-money, shall be paid to the said [*executors*], in part payment of the said sum of £——, and that they shall concur, &c."

(*b*) If part of the purchase-money is to be paid to the executors, say—

Variation.

"in consideration of the sum of £—— paid by the said [*purchaser*], by the direction of the said [*executors*], in manner following, that is to say, the sum of £——, part thereof, to the said [*executors*], in part payment of the said principal sum of £——, so due and owing on the security of the hereinbefore recited indenture of mortgage as aforesaid, and the sum of £——, the residue thereof, to the said [*mortgagor*]" (*the receipts, &c.*).

XL. Conveyance in Fee by Mortgagor and Executors of Mortgagee.

sum of £—— now paid by the said [*purchaser*] by the direction of the said [*executors*] to the said [*mortgagor*] (the receipt and payment whereof in manner aforesaid the said [*mortgagor*] and [*executors*] respectively acknowledge) [the said [*heir at law*], by the direction of the said [*executors*], hereby as trustee conveys, and] the said [*executors*] hereby as mortgagees convey [and confirm], and the said [*mortgagor*] hereby, as beneficial owner, conveys and confirms unto the said [*purchaser*] and his heirs, ALL THAT, &c. [*describe parcels*]; TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, freed and discharged from all principal and interest moneys and from all claims and demands under or by virtue of the said indenture of mortgage; AND the said [*executors*] hereby acknowledge the right of the said [*purchaser*] to production of the several deeds and documents mentioned in the schedule hereunder written [and undertake for the safe custody thereof (*c*)].

Habendum. Freed from mortgage.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XLI. *CONVEYANCE by* ADMINISTRATOR *of a deceased* MORTGAGOR *and a* MORTGAGEE *in performance of a Contract for Sale by an* INTESTATE (*d*).

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN [*mortgagee*], of, &c., of the first part; [*administrator*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part:

Recitals: of mortgage; WHEREAS by an indenture dated, &c., and

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(*c*) As to undertaking by trustees, &c., see *ante*, Vol. I., pp. 296 *et seq.*

(*d*) In cases where, upon the death of a vendor before completion, the legal estate is outstanding, it appears doubtful whether either the 4th or the 30th sections of the Conveyancing and Law of Property Act applies.

XLI. Conveyance by Administrator of Mortgagor and Mortgagee.

made, &c., in consideration of £—— paid by the said [*mortgagee*] to the said [*mortgagor*], the said [*mortgagor*] granted the hereditaments hereinafter conveyed to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso in the indenture now in recital contained, for the redemption of the said hereditaments on payment by the said [*mortgagor*], his executors, administrators, and assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £——, with interest at the rate therein mentioned; AND WHEREAS the said [*mortgagor*], on the —— day of ——, 18—, entered into a contract with the said [*purchaser*] for the sale to him of the fee simple in possession, free from incumbrances, of the said hereditaments hereby conveyed, at the price of £——; AND WHEREAS the said [*mortgagor*] died on the —— day of ——, 18—, intestate, and letters of administration of his personal estate were, on the —— day of ——, 18—, granted out of the —— Registry of the Probate Division of Her Majesty's High Court of Justice to the said [*administrator*]; AND WHEREAS the title of the said [*mortgagor*] had been accepted by the said [*purchaser*], but the said contract remained unexecuted at the date of the death of the said [*mortgagor*], no purchase-money having been paid or conveyance executed in pursuance thereof; AND WHEREAS the said [*purchaser*] has requested the said [*administrator*] and the said [*mortgagee*] to make such conveyance as hereinafter appears; AND WHEREAS the sum of £—— still remains due and owing to the said [*mortgagee*] upon the security of the hereinbefore recited indenture of mortgage, but all interest thereon has been paid up to the date of these presents. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said contract, and in consideration of the sum of £—— paid to the said [*mortgagee*] by the said [*purchaser*] at the request of the said [*administrator*], the receipt of which sum of £—— the said [*mortgagee*] hereby acknowledges, and in consideration of the sum of £—— paid to the said [*administrator*] by the said [*purchaser*], the payment and receipt of which sums of £—— and £—— (making together the sum of £——), the said [*administrator*] hereby acknowledges, the said [*mortgagee*], by the direction of the said [*administrator*], hereby grants, and, as mortgagee, conveys, and the said [*administrator*] hereby grants and confirms, and, as the personal representative of the said [*mortgagor*] deceased, conveys unto the purchaser and his

of contract for sale;

of death of vendor intestate;

of acceptance of title, and that contract remained unexecuted;

of request for completion by purchaser;

of state of mortgage debt.

Testatum.

Conveyance.

XLI. Conveyance by Administrator of Mortgagor and Mortgagee.

heirs, ALL THOSE [*describe parcels*], and also all other (if any) the hereditaments and tenements comprised in the hereinbefore recited indenture of mortgage; TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns.

Parcels.

Habendum.

IN WITNESS, &c.

XLII. *CONVEYANCE under the Settled Land Act, 1882, of* FREEHOLDS *to which an* INFANT *is absolutely entitled in Fee Simple* (*e*).

Parties (*f*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., and [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part:

Recital of will.

WHEREAS [*testator*], late of, &c., deceased, made and executed his will, dated, &c., and thereby ordered that all his debts should be paid, and with the payment thereof did charge all his estate; And, subject thereto, the said [*testator*] gave, devised, and bequeathed, All his real and personal estate, of what nature or kind soever and wheresoever, unto his son [*infant*], his heirs, executors, administrators, and assigns, but the said will contained no power of sale of the hereditaments thereby devised, nor any appointment of any persons to be the trustees thereof for the purposes of the Settled Land Acts:

of death of testator, &c.;

AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, seised of the lands and hereditaments hereby conveyed, (together with other hereditaments) in fee, free from incumbrances, and his said will was, on the —— day of ——, 18—, proved in the Principal Registry of Her Majesty's High Court of Justice, Probate Division:

of payment of debts;

AND WHEREAS the debts of the said [*testator*] have all been fully paid and satisfied:

of order appointing

AND WHEREAS the said [*infant*] is an infant under the age of twenty-one years:

AND WHEREAS, by an order of the Chancery

(*e*) As to the sale of the lands of an infant under this Act, see *ante*, p. 68.

(*f*) Although sect. 61 of the Act contains no express provisions to meet the case of an infant married woman, it seems clear that sects. 59 and 60 would apply to such a case; but if she is not entitled for her separate property, it is conceived that her husband's concurrence will be necessary.

Division of Her Majesty's High Court of Justice, made on the —— day of ——, 18—, by Mr. Justice ——, in the matter of, &c., it was ordered that during the minority of the said [*infant*], that the powers of sale and conveyance, and other powers conferred on tenants for life by the Settled Land Act, 1882, might be exercised by the said [*vendors*] on behalf of the said [*infant*] during his minority over or in relation to his said estate (*g*); And it was thereby further ordered that all moneys which should from time to time be paid in respect of the exercise of the said powers of sale and conveyance by the said [*vendors*] should be paid into Court to the credit of an account intituled, &c.: And whereas the said [*vendors*], in exercise of the said powers vested in them by the said order, have agreed with the said [*purchaser*] for the sale to him of the said lands and hereditaments hereby conveyed in fee simple in possession, free from incumbrances, at the price of £——: And whereas, pursuant to the hereinbefore-recited order, the sum of £——, being the amount of the purchase-money so agreed upon as aforesaid, was, on the —— day of ——, 18—, paid into Court to the credit of the said account: And whereas the

persons to sell and convey;

of agreement for sale;

of payment of purchase-money into Court;

of agreement

(*g*) As to the appointment of persons to exercise these powers on behalf of an infant, see sect. 60 of the Settled Land Act, 1882.

If the order went on to appoint the vendor to be "trustee of settlement," add here,—

And it was thereby further ordered that the said [*vendors*] should, during the minority of the said [*infant*], be the trustees of the settlement created by the will of the said [*testator*] for the purposes of the Settled Land Acts.

In the present case the will under which the infant is entitled to the lands sold is evidently the "settlement" within the definition contained in sect. 2 of the Settled Land Act, 1882; but where an infant derives his title by descent, it is not clear what instrument (if any) is to be regarded as the settlement. It appears, however, to be sufficient for the purposes of the sale of an infant's lands, whether his title is derived under a settlement or by descent, that the order should merely appoint persons to exercise on his behalf the powers of sale and conveyance given by the Act. The persons so appointed can sell and convey the lands to the purchaser, and no "trustees of the settlement" are required in such a case for the purpose of receiving notices or any other purpose connected with the sale, except for the purpose of receiving and giving receipts for the purchase-money, which, as there are no trustees, must be paid into Court: see *Re Countess of Dudley's Contract*, 35 Ch. D. 338.

XLII. Conveyance of Lands of an Infant.

as to documents of title.

deeds and muniments of title specified in the schedule hereunder written relate not only to the lands and hereditaments hereby conveyed, but also to other hereditaments formerly of the said testator, but now of the said [*infant*]; And it has been agreed that such deeds and muniments shall be retained by the said [*infant*], and that the said [*vendors*] shall enter on his behalf into such acknowledgment [and undertaking] in relation thereto as is hereinafter contained: NOW THIS

Testatum.

INDENTURE WITNESSETH, that, for effectuating the said contract, and in consideration of the sum of £—— so paid by the said [*purchaser*] into Court as aforesaid, the payment of which sum of £—— the said [*vendors*] hereby acknowledge, they the said [*vendors*], by virtue and in exercise of the powers conferred upon tenants for life under the Settled Land Act, 1882, and vested in them by the hereinbefore-recited order of the —— day of ——, 18—, and of every or any other power enabling them in this behalf, do hereby on behalf of the said [*infant*] as trustees, convey unto the said [*purchaser*] ALL and singular [*describe parcels*], To

Habendum.

HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns: AND the said [*vendors*] hereby,

Acknowledgment, &c.

on behalf of themselves, and also (so far as they lawfully may or can) of the said infant, acknowledge the right of the said purchaser to production of the deeds and muniments of title specified in the schedule hereunder written, and to delivery of copies thereof, [and hereby undertake for the safe custody of the same, but so long only as they shall be in their own actual possession (*h*)].

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

Acknowledgments and undertakings as to title-deeds.

(*h*) The statutory acknowledgment for production and undertaking for the safe custody of deeds and documents by a person *retaining* them imposes an obligation while the givers have the custody or control of the deeds. It would seem that the persons appointed to sell and convey the infant's lands must necessarily retain the custody and control of the deeds for the purposes of future sales until he attains full age, when the right to such custody and control and also the obligation would pass to him. It is therefore conceived that an acknowledgment and undertaking in the form given in the text would sufficiently meet the requirements of the case. It seems, however, somewhat doubtful how far the vendors can bind the infant, either by acknowledgment (if they do not themselves retain the deeds) or by covenant. As to whether the

XLIII. *CONVEYANCE by* MARRIED WOMAN *seised in fee (who was* MARRIED BEFORE *the* MARRIED WOMEN'S PROPERTY ACT, 1882, *came into operation), with the* CONCURRENCE *of the* HUSBAND.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor's husband*], of, &c., and [*vendor*] his wife (*i*), Parties.

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vendors who are trustees or *quasi* trustees can be required to give an undertaking, see *ante*, Vol. I., p. 296, sub tit. ACKNOWLEDGMENTS.

If, however, in order to obviate any question on the point as to retainer above referred to it is thought advisable, the vendors may give a covenant for production of the deeds, &c., as follows :—

AND the said [*vendors*] hereby covenant with the said [*purchaser*] that they the said [*vendors*] will, at the request of the said [*purchaser*] or of any person or persons lawfully claiming under him, either produce and deliver copies of the said deeds and muniments of title, or execute and do all such acts and things as by the said [*purchaser*] or such other person or persons as aforesaid may be reasonably required for procuring the production and delivery of copies of the said deeds and writings by the said [*infant*], or any other person having possession or control thereof from time to time, to the said [*purchaser*] or such other person or persons as aforesaid.

IN WITNESS, &c.

(*i*) This deed must be acknowledged by the vendor, under 3 & 4 Will. 4, c. 74, sects. 77, 79. A married woman who was married since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into operation (*i.e.* the 1st of January, 1883), or whose title accrued since that date, may deal with her real estate as if she were a *feme sole ;* but if she was married or if her title accrued previously, her husband's concurrence will be necessary to pass the legal estate, even though she is entitled to the property to her separate use without restraint on anticipation, unless the legal estate is vested in trustees, in which case they must concur in order to vest it in the purchaser ; but even so, the husband's concurrence should be obtained, if possible, by way of confirmation, so as to pass any interest in the land which may have been created by his wife in his favour, and also so as to obtain his implied covenants for title. Acknowledgment by married woman.

If a married woman conveys in exercise of a general power of appointment only, the conveyance will not differ in form from an ordinary conveyance by appointment : see *ante*, Precedent IV., p. 384 ; if she conveys by way of appointment and grant, it is advisable that her husband should concur in the grant. For a form of conveyance by appointment and grant, see *ante*, Precedent V., p. 385. Appointment by married woman.

XLIII. Conveyance by Married Woman Married before 1st January, 1883.

of the one part, and [*purchaser*], of the other part: WHEREAS [*testator*], late of, &c., deceased, duly made and executed his will, dated, &c., and thereby devised the hereditaments hereinafter described to the use of [A. B.] his wife, since deceased, for her life, with remainder to the use of the said [*vendor*], by her then name of [*maiden name*], and her heirs and assigns: AND WHEREAS [*recite death of testator and probate of his will*]: AND WHEREAS the said [A. B.] died on the —— day of ——, 18—: AND WHEREAS the said [*vendor*], on the —— day of ——, 18—, intermarried with the said [*husband*]: AND WHEREAS the said [*husband*] and [*vendor*] have agreed with the said [*purchaser*] for the sale to him of the hereditaments hereby conveyed in fee simple in possession, free from incumbrances: NOW THIS INDENTURE WITNESSETH that, in consideration of the sum of £—— paid by the said [*purchaser*] to the said [*husband*] and [*vendor*] the receipt of which sum of £—— the said [*husband*] and [*vendor*] hereby acknowledge, the said [*vendor*] hereby grants and disposes of (*l*), and as beneficial owner (*m*) conveys, and the said

Recitals (*k*):
of will;
of deaths, &c.;
of marriage of vendor;
of agreement for sale.

Testatum.

Conveyance.

(*k*) The insertion of these recitals seems advisable in order to show that the marriage took place, and that the wife's title accrued before 1883.

(*l*) The word "dispose of" is generally used in conveyances by married women, being the term employed in the enabling sections of the Fines and Recoveries Act.

(*m*) The covenants implied in the deed in the text are those provided for by the Conveyancing and Law of Property Act, 1881, sect. 7, sub-sect. (3). Under that sub-section, where the wife and husband both convey as beneficial owner, there are implied on the part of the wife the usual covenants for title, which will bind her separate estate: *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; and on the part of the husband, first, the usual covenants for title which, under sub-sect. (2), are implied as against a person directing as beneficial owner; and, secondly, covenants in the same terms as the wife. The effect of sub-sect. (2) appears to be that a person directing as beneficial owner enters into the same covenants as if he were the actual conveying party and conveyed as beneficial owner. Accordingly, in a conveyance by husband and wife, in the form in the text, the purchaser would obtain the benefit of the covenants on the part of the wife as to the acts of herself and her predecessors in title, and by the husband as to his own acts, and also the acts of the wife and her predecessors in title.

Where a married woman was married after the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), or where her title has accrued since that date, though she was married previously, she can sell and convey her property without

[*husband*] hereby as beneficial owner conveys and confirms unto the said [*purchaser*] and his heirs, All that, &c. [*parcels*], To HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns (*n*).

IN WITNESS, &c.

XLIII. **Conveyance by Married Woman Married before 1st January, 1883.**

Parcels.

Habendum.

XLIV. *CONVEYANCE of* FREEHOLDS *by a* MARRIED WOMAN *seised in fee (who was* MARRIED AFTER *the Married Women's Property Act*, 1882, *came into operation)—Variations where the* HUSBAND *joins in the Conveyance by way of* CONFIRMATION, *and to give implied* COVENANTS FOR TITLE (*o*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], the wife of [*husband*], of, &c., of the one [*or* first] part; [the said [*husband*], of the second part;] and [*purchaser*], of, &c., of the other [*or* third] part: WHEREAS the said [*vendor*] intermarried with the said [*husband*] on the —— day of ——, 1884: AND WHEREAS the said [*vendor*], being seised in her own right of the hereditaments hereinafter described, has agreed to sell to the said [*purchaser*] the fee simple of the same, free from incumbrances, at the

Parties.

Recitals: of marriage of vendor; of vendor's title and agreement for sale of land;

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her husband's concurrence or any necessity for acknowledgment of the conveyance, which will be in the ordinary form. She should, however, be described as "the wife of [*husband*], to whom she was married on the —— day of ——, 18—," if she was married after the commencement of the Act, or else her title should be recited sufficiently to show that it accrued since that date; see as to the meaning of the word "accrue," *ante*, p. 72.

(*n*) If any deeds are retained it would seem that they would be in law the property of the husband in right of his wife, and accordingly the acknowledgment for their production and undertaking for their safe custody should be by him as the person retaining the deeds; it is, however, usual and proper to make the wife join in the acknowledgment and undertaking, so as to avoid any question on the point.

Acknowledgment and undertaking as to deeds.

(*o*) A married woman married since the 31st December, 1882, is competent of herself to sell and convey her real and personal property: see *ante*, p. 473; but it may be advisable to obtain the husband's concurrence, if he is willing to give it.

XLIV. Conveyance by Married Woman Married since 31st December, 1882.

price of £——: [And whereas the said [*husband*] has consented, at the request of the said [*vendor*], and for the satisfaction of the said [*purchaser*], to join in these presents for the purposes and in manner hereinafter appearing]: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement [*or* agreements], and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby, as beneficial owner, conveys [and the said [*husband*], for the purpose as well of confirming the conveyance so made by the said [*vendor*] as also of including and implying in these presents covenants on his part for title to and further assurance of the hereditaments hereby conveyed, as beneficial owner conveys and confirms] unto the said [*purchaser*] and his heirs All that [*describe parcels*], To hold all the premises Unto and to the use of the said [*purchaser*], his heirs and assigns.

[of agreement by husband to concur].

Testatum.

Conveyance.

In witness, &c.

XLV. *CONVEYANCE by three* Co-heirs (*one being a* Married Woman *conveying her undivided share with her* Husband's concurrence, *and another being an* Infant) *of* Freeholds *to a* Purchaser —Covenants *by Adult conveying Parties that the Infant shall execute the Conveyance on attaining full age; One-third of the Purchase-money being meantime retained by the Purchaser* (*p*).

THIS INDENTURE, made the —— day of ——, 18—, Between [A. B.], of, &c., and [C. B.] his wife, [D. E.], of,

Parties.

As to including infant's share in conveyance.

(*p*) Sometimes when an infant's share in an estate is sold together with others, it is included in the deed of conveyance, and he is made a conveying party in respect of that share, and executes the deed when he comes of age, the time of his execution being noticed in the memorandum of attestation. If this course is not adopted, it will be necessary to have an additional conveyance prepared for execution by the infant when he comes of age, or to make

XLV. Conveyance by Several Co-heirs, One being an Infant.

&c., spinster, and [F. G.], of, &c. (an infant under the age of twenty-one years), of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS [H. E.], late of, &c., died on the —— day of ——, 18—, intestate, being at the time of his death seised of the hereditaments hereby conveyed, for an estate in fee simple, free from incumbrances: AND WHEREAS there was issue of the said [H. E.] three daughters only, that is to say, the said [C. B.], who, on the —— day of ——, intermarried with the said [A. B.]; the said [D. E.], and [I. G.], who, on the —— day of ——, 18—, intermarried with [J. G.], of, &c., who is long since deceased: AND WHEREAS the said [I. G.] died on the —— day of ——, 18—, intestate, leaving the said [F. G.], her eldest son, her surviving, who is an infant of the age of nineteen years or thereabouts, having been born on the —— day of ——, 18—: AND WHEREAS the said [A. B.] and [C. B.] his wife, and the said [D. E.], have agreed with the said [*purchaser*] for the absolute sale in fee simple in possession of the said hereditaments hereby conveyed, free from incumbrances, for the price of £——: AND WHEREAS, inasmuch as the sale of the undivided third part vested in the said [F. G.] of and in the same hereditaments cannot be now perfected by reason of his infancy, it has been agreed that the said [F. G.] shall be made a party to these presents, to the intent that he shall execute the same when he shall have attained the full age of twenty-one years; And it has been also agreed that the said [C. B.] and [D. E.] shall enter into a covenant hereinafter contained to procure the execution of these presents by him, or in case of his death in the meantime by his heir, within the time and in manner hereinafter mentioned, and have agreed that in the

Recitals:
of death of former owner intestate;
of state of family of intestate (*q*);
of contract for sale;
of agreement as to making the infant a party to the conveyance, and retainer of his share of the purchase-money.

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an application to the Court to appoint persons who will convey his share on his behalf under the provisions of the Settled Land Act, 1882: see *ante*, p. 471. When the infant is made a party, there is perhaps a little want of technical propriety in making the adult vendors covenant that he shall execute the deed; but this formal inaccuracy seems to be sanctioned by practice, and may be excused on the ground of convenience.

(*q*) A little saving in length may sometimes be effected by stating facts of this kind in the description of the parties; but these recitals out of place render the instrument less intelligible on a first perusal, and the use of them is not to be recommended. The very common practice of using them in addition to the regular recitals of the same facts is quite indefensible.

XLV. **Conveyance by Several Co-heirs, One being an Infant.**

Testatum.

In consideration of purchase-money, grantors convey their respective shares.

meantime the sum of £——, part of the said purchase-money, shall be retained by the said [*purchaser*], at interest after the rate of —— per cent. per annum: NOW THIS INDENTURE WITNESSETH, that in pursuance of the hereinbefore-recited agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [A. B.] and [C. B.] his wife, and [D. E.] (the receipt of which sum of £——, making, together with the said sum of £—— agreed to be retained by the said [*purchaser*] as aforesaid, the said purchase-money or sum of £——, the said [A. B.], [C. B.], and [D. E.] do hereby respectively acknowledge), they the said [A. B.], [C. B.], [D. E.], and [F. G.] do, and each of them doth, according to his and her estate and interest grant, and as beneficial owners and owner convey, unto the said [*purchaser*] and his heirs, ALL that [*describe parcels*], TO HOLD all the premises UNTO and to the use of the said [*purchaser*], his heirs and assigns; AND the said [A. B.], [C. B.], and [D. E.], do hereby jointly and severally covenant with the said [*purchaser*] that the said [F. G.], within one calendar month next after that he shall have attained the age of twenty-one years, or in case of his death in the meantime then the heir of the said [F. G.], within one calendar month next after such decease, or if such heir shall be under any disability, then within one calendar month after the removal of such disability, and also any person or persons claiming through or under him the said [F. G.], or his heirs (*r*), shall, at the request of the said [*purchaser*], but at the cost of the parties hereto of the first part, or some of them, and upon payment of the said sum of £—— [*the retained share of the infant*], with all interest at the rate aforesaid, duly execute these presents, or such other conveyances and assurances as the said [*purchaser*], his heirs or assigns, shall reasonably require for the purpose of effectually vesting in the said [*purchaser*], his heirs and assigns, or as he or they shall direct, All that one undivided third share now vested in him the said [F. G.] of and in all and singular the said hereditaments and premises unto and to the use of the said [*purchaser*], his heirs and assigns, or as he or they shall direct, free from all incum-

Covenant that the infant shall convey when of age.

(*r*) This would extend to any wife of the infant or heir who might be dowable.

brances whatsoever made, done, committed, or suffered by him the said [F. G.], or any person or persons claiming through or under him; And that in the meantime it shall be lawful for the person or persons for the time being entitled under these presents, peaceably and quietly to hold and enjoy the said undivided third share of the said hereditaments and premises, without any interruption or disturbance of or by the said [F. G.], or any person or persons lawfully claiming through or under him; And the said [*purchaser*] hereby covenants with the said parties hereto of the first part and every and each of them, that he the said [*purchaser*], his heirs, executors, or administrators, will on the perfecting such conveyance of the undivided third part or share of the said [F. G.], of or in the hereditaments and premises as aforesaid, pay unto the said [F. G.] or his heirs the sum of £—— agreed and intended to be retained by him the said [*purchaser*] out of the said entire purchase-money of £——, together with interest for the same at the rate aforesaid in full satisfaction and discharge of his purchase-money; and that in the meanwhile the same sum of £—— and interest thereon shall be a charge on the premises hereby conveyed.

In witness, &c.

XLV. Conveyance by Several Co-heirs, One being an Infant.

Covenant by purchaser to pay infant his share of purchase-money on his conveying.

XLVI. *CONVEYANCE on Sale of* Freeholds *by* Committee *of* Lunatic's *Estate.*

THIS INDENTURE, made the —— day of ——, 18—, Between [*lunatic*], of, &c., a lunatic acting by [*committee*], of, &c., the committee of the estate of the said [*lunatic*], of the one part, and [*purchaser*], of, &c., of the other part: Whereas the said [*lunatic*] was at the date of the proceedings next hereinafter recited seised of or otherwise well entitled to the lands and hereditaments hereby conveyed: And whereas by an inquisition taken before ——, Esq., a master in lunacy, on the —— day of ——, under a commission of lunacy, the said [*lunatic*] was duly found to be a person of unsound mind: And whereas by an order of the Lords Justices of the Court of Appeal, entrusted by the sign manual of Her

Parties.

Recitals: of title of lunatic to lands; of inquisition in lunacy; of order appointing committee;

XLVI. Conveyance of Lands of a Lunatic by his Committee.

Majesty with the care and commitment and custody of idiots, lunatics, and persons of unsound mind, and their estates, in the matter of the said lunacy, made on the —— day of ——, 18—, the said [*committee*] was appointed committee of the person and estate of the said [*lunatic*]: And whereas the

of conditional contract for sale;

said [*committee*], as such committee as aforesaid, has agreed with the said [*purchaser*] for the sale to him of the hereditaments hereby conveyed (being part of the freehold property of the said [*lunatic*]) at the price of £——, but such contract was made subject to the proper consent and sanction in that behalf being obtained: And whereas by an order of

of order approving contract for sale;

the Lords Justices, made in the matter of the said lunacy on the —— day of ——, it was ordered that the said provisional contract should be carried into effect on behalf of the said [*lunatic*], and that the said [*purchaser*] should pay into Court to the credit, &c., the said sum of £—— and any interest which should become payable thereon under the provisions of the said provisional contract; And that upon payment as aforesaid the said [*committee*], as committee of the estate of the said [*lunatic*], should, on behalf of the said [*lunatic*], execute a proper conveyance of the said lands and hereditaments comprised in the said contract, and that such conveyance be settled and approved by the Masters in Lunacy on behalf of the said [*lunatic*]: And whereas the said [*purchaser*], on the —— day of ——, paid the sum of £—— into Court to the credit, &c., but no interest became payable on the said sum of £—— under the provisions of the said provisional contract: And whereas ——, Esq., one of the Masters in Lunacy, has settled and approved of these presents as a proper conveyance pursuant to the said order of the —— day of —— of the said hereditaments, as appears by his signature on the first skin of these presents, and his signature and allowance on the last skin of these presents: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said order of the —— day of ——, and for effectuating the said sale, the said [*lunatic*], acting by the said [*committee*] as such committee as aforesaid, hereby as beneficial owner conveys, and the said [*committee*] hereby as committee of the estate of the said [*lunatic*] hereby conveys (*s*) and confirms

of payment of purchase-money into Court;

of approval of conveyance by Master in Lunacy.

Testatum.

Conveyance.

(*s*) For the covenant on the part of the committee thus implied, see *ante*, p. 222.

unto the said [*purchaser*] and his heirs, ALL that [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns.

IN WITNESS, &c.

XLVI. Conveyance of Lands of a Lunatic by his Committee.

XLVII. *CONVEYANCE to* COMMITTEE *of* LUNATIC'S *Estate of* FREEHOLD HOUSE *purchased for Lunatic's Residence.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the first part; [*lunatic*], of, &c., a lunatic acting by [*committee*], of, &c., the committee of the estate of the said [*lunatic*], of the second part; and [*trustees*], of, &c., of the third part: WHEREAS [*recite inquisition and appointment of committee, ante*, p. 479]: AND WHEREAS the said [*committee*], acting on behalf of the said [*lunatic*], has agreed with the said [*vendor*] for the purchase of the messuage and hereditaments hereby conveyed for an estate of fee simple in possession, free from incumbrances, at the price of £——, conditionally upon an order being obtained confirming such agreement: AND WHEREAS by an order of the Lords Justices, made in the matter of the said lunacy on the —— day of ——, upon the report of —— Esq., one of the Masters in Lunacy, it was ordered that the said report be confirmed, and that the conditional agreement so entered into by the said [*committee*], as such committee as aforesaid, should be confirmed, and that the said [*committee*] should be at liberty, on behalf of the said [*lunatic*], to carry out such agreement and to complete the purchase of the said messuage and hereditaments approved of by the said Master by his said report as proper to be purchased for the said [*lunatic*], being the messuage and hereditaments hereby conveyed, with the approbation of the Masters in Lunacy; And it was ordered that the property to be so purchased be deemed and taken to be part of the personal estate of the said [*lunatic*]; And it was ordered that it be referred to the said Masters to inquire and certify whether a good title could be made to the said messuage and hereditaments, and in case the said Masters should be of opinion that a good title could be made thereto,

Parties.

Recitals:
of proceedings in lunacy;
of conditional agreement for purchase of house;
of order in lunacy for purchase of house;

XLVII. Conveyance of Freehold House, &c., to Committee of a Lunatic.

then it was ordered that the said Masters should settle and approve of proper conveyances of the said messuage and premises to such person or persons as they should approve of in trust for the said [*lunatic*], his executors, administrators, and assigns; And it was ordered that upon production of the Master's certificate of the execution by all proper parties of such conveyance, so much of a certain sum of £—— Bank 3*l.* per cent. annuities therein mentioned to be standing to the credit, &c., should be sold, &c., and that out of the moneys to arise by such sale the amount of the purchase-money, together with any interest that should become due in respect thereof should be paid to such person or persons as should be named in the said certificate as the proper person or persons to receive the same respectively: And whereas it appears by the certificate of ——, Esq., one of the said Masters, dated, &c., that a good title can be made to the said messuage and hereditaments, and that these presents have been settled and approved by him as a proper conveyance pursuant to the said order, and the said [*vendor*] is named in the said certificate as the proper person to receive the said purchase-money of £—— and any interest payable thereon, and that the said [*vendor*] and [*trustees*] are the proper persons to execute these presents: And whereas the said Master has, in testimony of his approbation as aforesaid, signed his name in the margin of the first skin of these presents, and his name and allowance in the margin of the last skin hereof: NOW THIS INDENTURE WITNESSETH, that in pursuance of the hereinbefore-recited order of the —— day of ——, and in consideration of the sum of £—— to be paid to the said [*vendor*] as the person therein described (*s*), the said [*vendor*] hereby as beneficial owner conveys unto the said [*trustees*] All that [*describe parcels*], To hold all the premises to the use of the said [*trustees*] (*t*), their heirs and assigns in trust for the said [*lunatic*], his executors, administrators, and assigns, to the intent that the same premises shall be considered to be part of the personal estate of the said [*lunatic*] (*t*).

of master's certificate as to title, and conveyance;

master's approval of conveyance.

In witness, &c.

(*s*) A memorandum of receipt will be endorsed on payment of the purchase-money.

(*t*) As to the operation and effect of a trust and declaration in the above form, see *Att.-Gen.* v. *Marquis of Aylesbury*, 16 Q. B. D. 408. Another form of limitation that may be adopted is to limit

XLVIII. *CONVEYANCE by a* LAND COMPANY *of a* LOT *of* LAND *sold by Auction subject to* RESTRICTIVE STIPULATIONS *as to User, &c.*—COVENANTS *by Vendors and Purchasers to observe the Stipulations.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN —— Land Company, Limited (hereinafter called the Company) of the one part and [*purchaser*], of, &c. (hereinafter called the purchaser), of the other part: WITNESSETH, that the Company, in consideration of the sum of £—— which (by the agents whose acknowledgement is indorsed hereon) the Company have received from the purchaser, do hereby as beneficial owners convey unto the purchaser and his heirs, ALL THAT [*describe parcels*], ALL which piece of land was part of an estate which was sold by public auction on the —— day of ——, 18—, in —— lots according to certain particulars and a plan published therewith, in which particulars and plan the said piece of land was distinguished as lot ——, and the portion and extent of which are indicated by the plan hereon, wherein the site is coloured ——; TO HOLD all the premises unto and TO THE USE of the purchaser, his heirs and assigns; AND the Company hereby acknowledge the right of the purchaser to production of the deeds and documents specified in the schedule hereto, and to delivery of copies thereof, and undertake for the safe custody of the same: AND WHEREAS the premises were sold to the purchaser subject to the stipulations hereinafter expressed which refer to the said plan, and relate also to the —— other lots comprised therein, which were offered for sale at the same time, and the following are the stipulations referred to:— (1) Each purchaser is forthwith to make and afterwards to maintain the boundary fences on his lot on the side marked —— within the boundary line; (2) Nothing is to be erected within —— feet of —— Road, or within —— feet of —— Road, except fences, and those not to exceed —— feet in height; (3) No dwelling-house or portion of any dwelling-

Parties.

Testatum.

Habendum.

Acknowledgment as to documents.

Recital of stipulations.

As to Fences.

Building lines.

Building.

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the estate to the trustees to the use of the lunatic for his life, or for a term determinable on his death, without impeachment of waste with remainder to the use of the trustees in trust for the personal representatives of the lunatic.

XLVIII. **Conveyance in Fee by Land Company.**

house shall be erected of less value than £——, or on lots —— to —— of less value than £——; the value of a house is its net first cost in materials and labour of construction, only estimated at the lowest current prices; (4) No building shall be erected as a shop, warehouse, or factory, nor any trade or manufacture be carried on, nor any operative machinery be fixed or placed on any lot: NOW THEREFORE the Company (as to such only of the said lots as remain vested in them), and the purchaser (as to the land hereby conveyed) do hereby respectively covenant and grant with and to each other, and with and to the owner or owners of any part of the land constituting the —— lots comprised in the said plan, jointly and severally, that they and he (the covenantors and covenantor) respectively will, and their respective successors, heirs, and assigns shall henceforth observe, perform, and comply with the said stipulations, and that nothing shall ever be erected, fixed, placed, or done upon the land so covenanted for by them or him respectively, or any part thereof in breach of, violation, or contrary to the fair meaning of the said stipulations; BUT this covenant is not to be held personally binding upon either the Company or their successors, or the purchaser or any other person, except in respect of breaches committed or continued during his, her, or their joint or sole seisin of or title to the land upon or in respect of which such breaches shall have been committed.

Covenants by vendors and purchaser for observance of stipulations (*u*).

Covenant not to be personally binding except during seisin.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

(*u*) As to the obligation and benefit of such restrictive covenants running with the land, see *ante*, pp. 257, *et seq.*

XLIX. *ASSIGNMENT of* LEASEHOLDS *held under* SEVERAL LEASES *by a* LIMITED LIABILITY COMPANY *to a Limited Liability Company, with* CONSENT *of* LESSORS, *being a* COMPANY *incorporated by a* SPECIAL ACT OF PARLIAMENT.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the —— Bank, Limited, carrying on business at ——, in the city of London (hereinafter referred to as the said —— Bank) of the first part; the —— Bridge Company, incorporated by an Act of Parliament made and passed in the —— year of the reign of his Majesty George III., intituled an Act for building a bridge, &c., of the second part; the —— Association, Limited, carrying on business at ——, in the county of Middlesex (hereinafter referred to as the said Association) of the third part: WHEREAS, by an indenture of lease dated the 1st day of March, 1850, and made between the said —— Bridge Company, of the one part, and [A. B.], of the other part, All that the wharf of the said —— Bridge Company, situate, &c., adjoining the stairs there belonging to the said —— Bridge Company, and abutting south upon the road leading from X. to the —— Bridge, north on the River ——, east on a wharf belonging to the said —— Bridge Company, and west partly on a road leading to a place called X. and partly on the said stairs, Together with the workshops and buildings then erected or which might thereon be erected by the said [*lessee*], his executors, administrators, and assigns, on the said wharf, whether for the purpose of trade or otherwise, which said wharf and premises were then in the occupation of the said [*lessee*], and with the buildings then erected thereon, were more particularly shown in the plan drawn in the margin of the indenture now in recital, Together with the appurtenances except the right of passing toll free over the bridge belonging to the said —— Bridge Company, were demised unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, 1850, for —— years, at the yearly rent for the first 10 years of the said term of £—— and during the remainder of the said term of £——, and under and subject to the covenants and condi-

Parties (*x*).

Recitals: of first lease;

parcels;

(*x*) As to what is a sufficient description of a joint stock company, see *ante*, p. 127.

XLIX. **Assignment of Leaseholds by a Company to a Company.**

tions therein contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed and performed, And in the indenture now in recital was contained a covenant on the part of the lessee not to assign or otherwise part with possession of the premises therein comprised, or any part thereof, without the consent in writing of the said —— Bridge Company, their successors and assigns; And

of second lease;

WHEREAS, by an indenture of lease dated the 10th day of June, 1855, and made between the said —— Bridge Company, of the one part, and the said [A. B.], of the other part,

parcels;

All that piece or parcel of ground situate on the south side of the road of the said —— Bridge Company, called —— Street, in —— aforesaid, abutting north on the said road, south and west on other ground belonging to the said —— Bridge Company, and east on a piece of ground also belonging to the said —— Bridge Company, which said ground contained in front next the road on the north 18 feet, on the east side 66 feet, on the west side 69 feet, and on the south side 20 feet (were the said several dimensions little more or less), together with the messuage or dwelling-house thereinafter covenanted to be built, and all other buildings and improvements which might be erected on the said ground during the term thereby granted, which said ground was therein stated to be then in the occupation of the said [*lessee*], and was more particularly shown in the plan drawn in the margin of the indenture now in recital, Together with the appurtenances thereunto belonging except the right of passing toll free over the bridge belonging to the said —— Bridge Company, to the said [*lessee*], his executors, administrators, and assigns, for the term of —— years, at the yearly rent after the first year of the said term of £——, and under and subject to the covenants and conditions therein contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed and performed; And

of mesne assignments;

WHEREAS, after divers mesne assignments and acts in the law and ultimately by an indenture dated, &c., and made, &c., the hereditaments and premises comprised in the hereinbefore recited indentures of lease of the 1st day of March, 1850, and the 10th day of June, 1855, respectively became vested in the said —— Bank for the respective residues then unexpired of the terms severally granted by such indentures of lease: And WHEREAS the said —— Bank have agreed with the said Association for the sale to them of the hereditaments

of agreement for sale;

XLIX. Assignment of Leaseholds by a Company to a Company.

and premises respectively comprised in and demised by the hereinbefore recited indentures of the 1st day of March, 1850, and the 10th day of June, 1855, for all the unexpired residues of the said several terms thereby respectively granted, at the price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the sum of £—— at or before the execution of these presents paid by the said Association to the said —— Bank (of which sum of £—— the said —— Bank do hereby acknowledge the receipt), THE said —— Bank, with the license and consent of the said —— Bridge Company (testified by their being parties to and executing these presents), Do hereby, as beneficial owners, convey unto the said Association, their successors and assigns, FIRST, ALL and singular the hereditaments and premises comprised in and demised by the hereinbefore recited indenture of the 1st day of March, 1850, AND, SECONDLY, ALL and singular the hereditaments and premises comprised in and demised by the hereinbefore recited indenture of the 10th day of June, 1855, and all buildings which since the date of the said respective indentures have been erected on the land comprised therein or on any part thereof respectively and their appurtenances, TO HOLD all the premises unto the said Association, their successors and assigns, AS TO the hereditaments and premises firstly hereinbefore described for all the residue now unexpired of the said term of —— years, granted by the hereinbefore recited indenture of the 1st day of March, 1850, subject to the payment of the rent and the performance of the covenants and considerations therein respectively reserved and contained, AND AS TO the hereditaments and premises secondly hereinbefore described for all the residue now unexpired of the said term of —— years granted by the hereinbefore recited indenture of the 10th day of June, 1855, subject to the payment of the rent and the performance of the covenants and conditions therein respectively reserved and contained, and as to all the said premises subject to the existing subtenancies thereof respectively; And the said Association do hereby for themselves, their successors and assigns, covenant with the said —— Bank, their successors and assigns, that the said Association, their successors and assigns, will at all times hereafter during the said several terms of years granted by the said several indentures of lease respectively pay the several yearly rents reserved by the said

Testatum.

XLIX. Assignment of Leaseholds by a Company to a Company.

indentures respectively, and observe and perform all the covenants and conditions contained in the same indentures respectively, and henceforth on the part of the said Association, their successors and assigns, to be observed and performed, and will at all times hereafter keep indemnified the said —— Bank, their successors and assigns, from and against the said rents respectively, and the observance and performance of the said covenants and conditions respectively, and all actions, suits, claims, demands whatsoever for or on account of the same or in anywise relating thereto.

IN WITNESS, &c.

L. *CONVEYANCE by a* COMPANY *in* VOLUNTARY LIQUIDATION, *and the* LIQUIDATORS *thereof, to a* NEW COMPANY, *of* MESSUAGES, WAREHOUSES, *&c., and of the* MACHINERY, PLANT, *&c., Book and other* DEBTS *and* GOODWILL *of the* BUSINESS (*y*).

THIS INDENTURE (*z*) made the —— day of ——, 18—, BETWEEN the —— Company, Limited (hereinafter called the old Company), of the first part; [*liquidator*], of, &c., and [*liquidator*], of, &c. (who are hereinafter called the said

(*y*) This Precedent is intended for use on the occasion of the reconstruction of a company by winding it up and transferring its premises and business to a new company formed for that purpose, and consisting altogether or for the most part of members of the original company. As to reconstruction of companies, see *ante*, sub tit. PARTNERSHIPS AND COMPANIES, Vol. IV., p. 354. A form of an agreement on reconstruction will be found at p. 594 of the same volume.

Stamp. (*z*) In this case the *ad valorem* duty as on a conveyance on sale will be payable on the aggregate amounts of the purchase-money (*i.e.* the value of the allotted shares, and the amount paid to the dissentient shareholders), and the debenture debt and interest due thereon, and the estimated value of the other debts of the old company.

Registration. This deed, or an agreement as to the issue and allotment of shares, should be filed with the Registrar of Joint Stock Companies: see the Companies Act, 1867 (30 & 31 Vict. c. 131), sect. 25.

Possession of the chattels being delivered to the new company on completion of the purchase, there is no need for registration under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31): see sect. 8 of that Act.

L. Conveyance of Premises, Business, &c., by a Company in Voluntary Liquidation to a New Company.

liquidators), the liquidators of the old Company, of the second part; and the —— Company, Limited (hereinafter called "the new Company"), of the third part: WHEREAS the old Company have for many years past carried on business at ——, and have from time to time acquired by purchase, lease, or otherwise, and are now possessed of or entitled to the several freehold [and leasehold (*a*)] messuages, lands, and hereditaments hereinafter described and hereby granted, [assigned], and conveyed respectively, and also of or to the fixtures, plant, machinery, and effects, book and other debts, choses in action, and personal property, hereinafter mentioned or referred to, and hereby assigned and conveyed respectively, subject nevertheless to divers debts and liabilities, and particularly to the debenture debt hereinafter mentioned: AND WHEREAS the old Company, in the year 18—, issued 200 debentures of 100*l.* each, carrying interest at the rate of —— per cent. per annum, and thereby charged with the payment of the principal moneys and interest thereby secured all the said freehold [and leasehold] hereditaments, and all the property of the old Company present and future: AND WHEREAS, by an indenture dated, &c., and made, &c., the old Company granted, demised, and assigned in manner therein mentioned, the said freehold and leasehold hereditaments, and all other the property of the old Company whatsoever and wheresoever, of or to which the old Company was then or might thereafter become possessed or entitled, unto and to the use of the said trustees, upon the trusts, for the purposes, with the powers, and subject to the provisions therein

Recitals: of issue of debentures by old company;

of trust deed to secure debentures;

(*a*) If, as is often the case, the leaseholds are vested in trustees for the old company and are intended to be vested in trustees for the new company, the transfer will be effected by a separate deed, and this recital will state, instead of as in the text, as follows:—

AND WHEREAS the old Company have, &c., and are now possessed of or entitled to the several freehold messuages, &c., hereinafter described and hereby granted, and also of or to certain leasehold messuages and pieces of land heretofore held in trust for the old Company, but intended by a deed of even date with these presents, and made, &c., to be assigned and conveyed to trustees in trust for the new Company, and also, &c. [*as in text*].

All further reference to the leaseholds will then be omitted throughout this Precedent, except as mentioned in note (*c*), *infra*.

L. Conveyance of Premises, Business, &c., by a Company in Voluntary Liquidation to a New Company.

contained, being trusts, purposes, covenants, and provisions for the better securing, as therein mentioned, the payment of the said principal moneys and interest secured by the said debentures: And whereas, by special resolutions of the old Company, duly passed and confirmed at extraordinary general meetings of the members thereof, held on the —— day of ——, 18—, and the —— day of ——, 18—, respectively, it was in effect resolved (*inter alia*) as follows: First, that the old Company be wound up voluntarily, and that the said liquidators be and they were thereby appointed liquidators for the purpose of such winding-up; Secondly, that the said liquidators be and they were thereby authorised to consent to the registration of a company (being the new Company), with memorandum and articles of association as therein mentioned; and Thirdly, that the draft agreement therein referred to (being the draft of the agreement hereinafter in part recited) be and the same was thereby approved, and that the said liquidators be and they were thereby authorised to enter into an agreement with the new Company when incorporated in the terms of the said draft agreement, and to carry the same into effect: And whereas, pursuant to the aforesaid resolutions, the new Company has been duly incorporated as a limited company under the Companies Acts, 1862 to 1883, with a nominal capital of £—— divided into —— shares of £—— each: And whereas by an agreement, dated, &c., and made, &c., being the agreement the draft whereof had been so approved as aforesaid, it was, among other things, in effect agreed that the old Company and the said liquidators should sell, and the new Company should purchase, the said freehold [and leasehold] hereditaments, and all other the property, assets, and effects of the old Company, subject to the said debenture debt and the securities for the same, and that in consideration of such sale and purchase, the new Company should allot to each of the members of the old Company who should be willing to accept the same, or their respective nominees, a number of shares in the new Company equal to the number of shares held by such members in the old Company as therein mentioned, and should undertake, pay, and discharge the said debenture debt and the securities for the same, and all other the debts and liabilities of the old Company, including all liabilities in respect of dissentient members thereof, if any, and should indemnify the old Company and the said liquidators in respect of such debts and

of resolutions with a view to reconstruction;

of incorporation of new Company;

of agreement for sale of premises and business of old Company to new Company;

L. Conveyance of Premises, Business, &c., by a Company in Voluntary Liquidation to a New Company.

liabilities respectively: AND WHEREAS the new Company have allotted to —— members of the old Company, or their nominees, being all the members of the old Company willing to take shares in the new Company, —— shares in the new Company, being the number of shares in the aggregate equal to the number of shares held collectively by such members in the old Company, and have paid the sum of £—— to —— dissentient members of the old Company, being all the members who dissented from the said agreement, in full discharge of the amount due to them in respect of shares in the old Company held by them respectively: AND WHEREAS it has been agreed that the new Company shall enter into the covenants on their part hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the issue and allotment to members of the old Company of the said —— shares in the new Company, and of the payment of the said sum of £—— to dissentient members of the old Company, the issue and allotment of which shares and payment of which sum of £—— in manner aforesaid respectively the old Company and the said liquidators hereby acknowledge, the old Company hereby grant, assign, and convey, and the said liquidators, as such liquidators as aforesaid, hereby confirm and [as trustees (*b*)] convey unto the new Company, FIRST, ALL AND SINGULAR the several freehold messuages, warehouses, &c. [*describe parcels by reference to Schedule, ut ante*, p. 400, *mutatis mutandis*]; AND SECONDLY, ALL AND SINGULAR [the several leasehold messuages, &c. [*describe parcels by reference to a Second Schedule, ante*, p. 400]; AND THIRDLY ALL AND SINGULAR] the fixtures, plant, machinery, stock in trade, chattels and effects, moneys, credits, book and other debts, bills, notes, and things in action, and all the undertaking and business and the goodwill thereof, and the full benefit of all securities for debts and things in action, and of all orders, contracts, and agreements of or to which the old Company is now possessed or entitled; AND all other (if any) the real and personal property of the old Company whatsoever and wheresoever (*c*), TO HOLD all the premises hereby

of allotment of shares in new Company;

of agreement for indemnity.

(*b*) See as to this note (*d*) *infra*.

(*c*) If the leaseholds are to be conveyed by a separate instrument, say—

"except the said leasehold messuages and lands intended to

L. Conveyance of Premises, Business, &c., by a Company in Voluntary Liquidation to a New Company.

granted, assigned, and conveyed respectively, UNTO AND TO THE USE of the new Company, their successors and assigns, in fee simple or absolutely, according to the nature and tenure of the same premises respectively; BUT [as to the said leasehold premises secondly hereinbefore described and hereby conveyed for the residues of the several terms therein created by the said several indentures of lease, which in the said second schedule hereunder written are respectively set opposite to the properties to which the same respectively relate, and at and subject to the several rents and covenants on the part of the lessees, and conditions reserved by and contained in the said indentures of lease respectively; AND] SUBJECT, as to all the premises hereby conveyed (*d*), to the said debenture debt of £—— and interest thereon, and also to all other charges, liens, incumbrances, debts, and liabilities of the old Company now subsisting, and affecting the same premises or any part thereof; AND the old company and the said liquidators respectively appoint the new Company, their successors or assigns, and such person or persons as they shall from time to time nominate or appoint, to be the attorneys or attorney of the old Company and the said liquidators respectively in the name of the old Company or of the said liquidators, but on behalf and benefit of themselves the new Company, their successors or assigns, to demand, receive, and recover or allow in account all and every the moneys, credits, book and other debts and things in action or property of a like nature belonging to the Company, and to give receipts and releases for or in respect of any moneys or other property so received, recovered, or allowed in account under or by virtue of these presents; And also to institute, carry on, defend, and compromise all actions and proceedings for enforcing the performance of contracts or agreements or otherwise in relation to the premises hereby conveyed or any of them; and generally to execute and do all such acts, deeds, and things in relation to the premises as the said attorneys or

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be conveyed by the said indenture of even date herewith as hereinbefore mentioned."

(*d*) If leaseholds are conveyed by a separate instrument, say—"In common with the said leasehold messuages and premises so intended to be assigned by the said indenture of even date with these presents as aforesaid."

L. Conveyance of Premises, Business, &c., by a Company in Voluntary Liquidation to a New Company.

attorney shall think expedient as fully and effectually as the old Company or the said liquidators could heretofore have done. And each of them the said liquidators, so far as relates to his own acts and deeds, hereby covenants with the new Company that they the said liquidators respectively have not done, omitted, or knowingly suffered or been party or privy to anything whereby the premises hereby conveyed, or any part of them, or any part thereof are, is, or may be incumbered or affected in anywise howsoever, except as aforesaid, or whereby they respectively are prevented from conveying the same premises, or any part thereof respectively, in manner aforesaid; And further that the said liquidators respectively and the old Company, and every person having or claiming any estate, right, or interest in the premises hereby conveyed, or any part thereof, through or in trust for the said liquidators, or the old Company will at all times hereafter, upon the request and at the cost of the new Company, their successors or assigns, execute and do every such assurance and thing for the further or more effectually assuring the premises, or any part thereof, unto and to the use of the new Company, their successors and assigns, according to the nature and tenure of the same premises respectively, as by them shall reasonably be required; And the new Company hereby covenant with the old Company, and also with the said liquidators, that they the new Company, their successors or assigns, will [from time to time pay the respective rents and perform and observe the respective covenants on the part of the lessees, and conditions contained in the said several indentures of lease, and will] duly pay and discharge the said debenture debt of £—— and all interest now or henceforth to become due in respect thereof, and also all other subsisting debts and liabilities whatsoever of the old Company, as and when the same shall become payable or dischargeable

Covenants by liquidators against incumbrances (*e*);

and for further assurance;

new company to pay debenture debt, &c.;

(*e*) A liquidator is not strictly speaking a trustee, and it may therefore perhaps be doubted whether the statutory covenant against incumbrances will be necessarily implied by his being expressed to convey "as trustee:" see *ante*, p. 222. It seems more correct, and may be well that the liquidators should enter into an express covenant that they have not incumbered as in the text, in which case the words "as trustee" in brackets on p. 491 will be omitted. In any case it is advisable that they should covenant for further assurance.

Covenant by liquidators against incumbrances.

L. Conveyance of Premises, Business, &c., by a Company in Voluntary Liquidation to a New Company.

respectively, including all costs, expenses, and liabilities, of and incident to the winding-up and dissolution of the old Company, and will perform and observe all contracts and agreements now subsisting and on the part of the old Company to be performed and observed; And will at all times hereafter keep indemnified the old Company and also the said liquidators and their respective heirs, executors, and administrators, from and against all actions, proceedings, costs, damages, expenses, claims, and demands for or in respect of the [non-payment of the said respective rents, or the] non-payment or non-discharge of the said debenture debt and other debts and liabilities of the old Company or the breach, non-performance, or non-observance of any [the said covenants and conditions contained in the said several indentures of lease, or any] such contract or agreement as aforesaid, or for or in respect of anything in anywise relating to the premises hereby conveyed, or any part thereof, or any [covenant, condition,] power, provision, matter, or thing contained in or relating to [the said several indentures of lease or] these presents.

for indemnity.

IN WITNESS, &c.

THE SCHEDULE [OR SCHEDULES] ABOVE REFERRED TO.

LI. *CONVEYANCE by* MORTGAGEES *and the* OFFICIAL LIQUIDATOR *of a* JOINT STOCK COMPANY, LIMITED, *of* FREEHOLDS *comprised in a mortgage to secure an account current, and* LEASEHOLDS *to a* PURCHASER (*f*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*mortgagees*], of, &c., carrying on the business of

Parties.

(*f*) By sect. 95 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the official liquidator of a company has power, with the sanction of the Court (*inter alia*), "to sell the real and personal and heritable and movable property, effects, and things in action of the

LI. Conveyance of Freeholds and Leaseholds by Mortgagees and Official Liquidator of a Company.

bankers at ——, in the county of ——, under the style or firm of —— and Co. (all of whom are hereinafter collectively called the said bankers), of the first part (*g*); the —— Company, Limited (hereinafter called the Company), of the second part; [*liquidator*], of, &c., the official liquidator of the company, of the third part; and [*purchaser*], of, &c., of the fourth part: WHEREAS, by an indenture dated, &c., and made, &c., the lands and hereditaments hereby granted and conveyed were assured to the use of the Company, their successors and assigns, free from incumbrances: AND WHEREAS, by an indenture of lease dated, &c., and made, &c., All that the yard or wharf and landing-place known as —— Wharf, in the parish of ——, in the county of ——, abutting on the north-east upon the River ——, on the north-west on land then belonging to ——, on the south-east on the —— Road, in the parish of —— aforesaid, and on the south-west on the wharf known as —— Wharf, and containing on the whole —— square

Recitals: of conveyance of freeholds to company;

of lease to company;

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company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;" and "to do all acts, and to execute in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal." And by r. 32 of the Rules of 1862 it is provided as follows: "Any real or personal property belonging to the company may be sold, with the approbation of the judge, in the same manner as in the case of a sale under a decree or order of the Court in a suit, or, if the judge shall so direct, by the official liquidator; and upon any such sale by the official liquidator, the conditions or contracts for sale shall be settled and approved of by the judge, unless he shall otherwise direct; and the judge may, if he thinks fit, direct such conditions and contracts, and the abstract of title to the property, to be submitted to one of the conveyancing counsel of the Court, under the second of the Consolidated General Orders [see now Ord. 2 of the Rules of the Supreme Court of 1883], and may on any sale by public auction, fix a reserve bidding; and, unless on account of the small amount of the purchase-moneys, or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper that the purchase-moneys shall be paid to him, all conditions and contracts of sale shall provide that the purchase-moneys shall be paid by the respective purchasers into the Bank of England to the account of the official liquidator of the company."

(*g*) If the bankers in this case had advanced moneys on a merely equitable security by deposit of deeds, they should be made parties of the third part, and the company and the liquidator parties of the first and second parts respectively: see *ante*, p. 123.

LI. Conveyance of Freeholds and Leaseholds by Mortgagees and Official Liquidator of a Company.

yards or thereabouts, were demised unto the Company for the term of 99 years less one quarter of a year from the 25th day of March then last past, at the rent of £—— per annum, and subject to the covenants and conditions therein contained, and on the part of the lessee to be performed and observed: And whereas, by an indenture dated, &c., and made, &c., for the considerations therein mentioned, the Company covenanted with the said bankers to pay unto the said bankers all and every the sums or sum of money which there were or was or might from time to time thereafter become due from the said Company, in account current with the said bankers as therein mentioned, with interest thereon as therein mentioned; And by the indenture now in recital the Company granted unto the said bankers, their successors and assigns, the said lands and hereditaments hereby granted and conveyed, To hold the same unto and to the use of the said bankers, their heirs and assigns, subject to a proviso for redemption thereof upon payment by the Company, their successors or assigns, to the said bankers, their successors or assigns, of all and every the sums of money therein-

of mortgage of freeholds to bankers to secure account current;

before covenanted to be paid by the Company; And whereas by an order the Chancery Division of her Majesty's High Court of Justice, made on the —— day of ——, 18—, by Mr. Justice X., in the matter of, &c., it was ordered that the Company be wound up by that Court under the provisions of the Companies Acts, 1862 and 1867: And whereas, at the date of the commencement of the liquidation of the Company there was due to the said bankers from the Company the sum of £—— on account current, together with a sum of £—— for interest thereon, as the said [*liquidator*] hereby acknowledges: And whereas by an order of the Chancery Division of her Majesty's High Court of Justice, made on the —— day of ——, 18—, by Mr. Justice X. in the said matter, the Court appointed the said [*liquidator*] official liquidator of the Company: And whereas, by a memorandum of agreement dated, &c., and made, &c., the said bankers and the said [*liquidator*], on behalf of the Company, agreed to sell, and the said [*purchaser*] agreed to purchase, the fee simple in possession, free from incumbrances, of the said lands and hereditaments hereby granted and conveyed, and also the said yard or wharf and premises comprised in and demised by the hereinbefore recited indenture of lease, for the residue of the said

of winding up order;

of amount due on mortgage;

of appointment of official liquidator;

of conditional agreement for sale;

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term of —— years, at the price of £——; And it was thereby provided that the said contract should be subject to the sanction of the Court to be obtained as therein mentioned: AND WHEREAS upon the signing of the said contract the said [*purchaser*] paid to the said [*liquidator*] the sum of £—— as a deposit, and in part payment of the said purchase-money of £——: AND WHEREAS, by an order of the Chancery Division of her Majesty's High Court of Justice, made on the —— day of ——, by Mr. Justice X., in the matter, &c., It was ordered, the mortgagees consenting to such order (*h*), that the said conditional contract be carried into effect, and that the said [*liquidator*] should pay into Court to an account to the credit of, &c., the said sum of £—— so paid into his hands by the said [*purchaser*] as aforesaid, and that the said [*purchaser*] should pay into Court to the credit of the account aforesaid the sum of £——, being the balance of the said purchase-money, and that upon such payments being made the said [*purchaser*] should be let into immediate possession of the lands, hereditaments, and premises hereby granted and assigned respectively, and that all necessary and proper parties, including the said [*liquidator*], should join in and execute a proper conveyance of the same, to be settled by the judge in case the parties differ: AND WHEREAS, in pursuance of the last-mentioned order, the said [*liquidator*] and the said [*purchaser*] have duly paid into Court to the credit aforesaid the sums of £—— and £—— respectively, making together the sum of £——: AND WHEREAS by an order, &c., the said judge, being of opinion that the indenture mentioned in such order (being these presents) was a fit and proper deed to be executed by the said [*liquidator*] on behalf of the Company, ordered that the said [*liquidator*] be at liberty to execute such indenture accordingly, and to affix the seal of the Company thereto. NOW THIS INDENTURE WITNESSETH that, in pursuance of the hereinbefore recited order of the —— day of ——, 18—, and in consideration of the said sums of £—— and £——, making together the sum of £——, so paid by the said [*liquidator*] and [*purchaser*] respectively into Court

of payment of deposit;

of order confirming agreement for sale;

of payment into Court of purchase-money;

of approval of conveyance by the Judge.

Testatum.

(*h*) The mortgagees may safely consent to the order and join in the sale, as the payment of the purchase-money into Court will give them a sufficient hold on the money so as to prevent its being dealt with otherwise than with their consent.

LI. Conveyance of Freeholds and Leaseholds by Mortgagees and Official Liquidator of a Company.

as aforesaid, of which sums of £—— and £—— the said bankers and the Company and the said [*liquidator*] hereby acknowledge the payment as aforesaid, the said bankers hereby grant and, as mortgagees, convey, and the Company hereby grant and convey (*i*), and the said [*liquidator*] hereby grants and confirms and [as trustee] conveys unto the said [*purchaser*] and his heirs ALL that [*describe freehold property*]; TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns. AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the last-mentioned order, and for the considerations aforesaid, the Company hereby assign, and the said [*liquidator*] hereby assigns, and [as trustee (*k*)] conveys, unto the said [*purchaser*] ALL and singular the said hereditaments and premises comprised in and demised by the hereinbefore recited indenture of the —— day of ——, TO HOLD all the last-mentioned premises UNTO the said [*purchaser*], his executors, administrators, and assigns, for all the residue now unexpired of the said term of —— years, subject nevertheless henceforth to the payment of the rent and the performance and observance of the covenants on the part of the lessees and conditions by and in the said indenture reserved and contained; AND the said [*purchaser*] hereby covenants with the said [*liquidator*] [*add covenant to indemnify official liquidator and* "the assets, estate, and effects" *of the Company against rent, covenants, &c., ut ante*, p. 392 (*l*)]: IN WITNESS whereof the said [*liquidator*], as such liquidator as aforesaid, has caused the common seal of the Company to be hereunto affixed, and the other parties hereto have hereunto set their hands and seals the day and year first above written.

Conveyance of freeholds.

Habendum.

Second *Testatum.*

Assignment of leaseholds.

(*i*) Inasmuch as the Company on being wound up ceases to exist, it is of little use to imply in their conveyance the statutory covenants for title.

(*k*) See as to the insertion of the words in brackets, *ante*, p. 493, note (*d*); if these words are omitted the liquidator will enter into an express covenant that he has not incumbered, and in any case he should, if willing, give a covenant for further assurance.

(*l*) It would seem that the purchaser of leaseholds under a liquidation would be bound to give this indemnity, as the assignment by the liquidator does not completely get rid of all liability under the lease, as in the case of bankruptcy: see *ante*, p. 351.

LII. *CONVEYANCE of* FREEHOLDS *to a* RAILWAY COMPANY *by a* VENDOR SEISED *in* FEE SIMPLE, *pursuant to Agreement* (*m*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and the —— Railway Company (hereinafter called the Company) incorporated by the —— Railway Act, 18— (hereinafter called the Special Act), of the other part: WHEREAS the said [*vendor*] is seised of or entitled to the pieces of land and hereditaments hereinafter described and hereby conveyed in fee simple in possession free from incumbrances; AND WHEREAS the said pieces of land and hereditaments are required by the Company for the purposes of their railway and undertaking, and the Company are authorised by the Special Act and by the Lands Clauses Act, 1845, and other Acts incorporated with the Special Act, or some of them, to take for the purpose of their railway and undertaking the said lands and hereditaments; AND WHEREAS the Company have accordingly agreed with the said [*vendor*] for the purchase of the said lands and hereditaments at the price of £——, and it has been agreed that such sum shall include the value of all mines and minerals thereunder, and also compensation for all claim, right, or title of the said [*vendor*] in, to, or in respect of the same lands and hereditaments, or any of them, in case any part thereof shall hereafter become superfluous lands within the meaning of the Lands Clauses Consolidation Act, 1845 (*n*), and for all damage caused by severing the aforesaid pieces of land and hereditaments from any other property of the said

Parties.

Recitals: of title of vendor;

of the power of company to take lands;

of agreement for purchase;

(*m*) The provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which relate to the purchase of lands by agreement, are contained in sects. 6 to 15 inclusive of that Act, whereby the promoters of undertakings are empowered to agree with owners of lands authorised by their special Acts to be taken. These sections will be found set out fully, with observations thereon, in the notes to Precedent IX., sub tit. AGREEMENTS, Vol. I., pp. 437 *et seq.*

Purchase of lands by agreement.

(*n*) This clause will enable the Company to dispose of their superfluous lands without being fettered by the rights of pre-emption given to the owner by the Lands Clauses Consolidation Act, 1845, sects. 128—130; but the Company will not be relieved from the obligation to sell within the prescribed period: see sect. 127 of the Act.

LII. Conveyance of Freeholds to Railway Company by Owner in Fee for a Gross Sum.

[*vendor*], or by otherwise injuriously affecting such other property in the exercise of the powers of the said Acts or any of them (*o*), and shall also be in full satisfaction for all communications, works, and things which might otherwise be required to be made or done under any of the said Acts for the enjoyment, protection, or accommodation of any adjoining property of the said [*vendor*]; AND WHEREAS the deeds and documents specified in the schedule hereunder written relate, not only to the said pieces of land and hereditaments hereby conveyed, but also to other property of the said [*vendor*], and it has been agreed that the said [*vendor*] shall retain possession of such deeds and documents, and that he shall give the acknowledgment and undertaking hereinafter contained in regard to the same. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the said sum of £—— paid by the said Company to the said [*vendor*] (the receipt of which said sum of £—— he the said [*vendor*] hereby acknowledges), he the said [*vendor*] hereby as beneficial owner conveys unto the said Company, ALL those pieces or parcels of land and hereditaments situate in the parishes of —— and —— in the county of ——, and containing by admeasurement —— acres, —— roods, and —— perches or thereabouts, which were late in the occupation of [A. B.] as tenant thereof, but are now in the possession of the said Company, all which same premises are delineated in the plan drawn in the margin of these presents, and are in the same plan, and also in the plans and books of reference of the said railway for the parishes of —— and —— aforesaid respectively distinguished by the numbers —— respectively; Together with all mines and minerals under the same premises (*p*), TO HOLD the said pieces of land and here-

of agreement as to deeds, &c.

Testatum.

Conveyance.

(*o*) As to the principles on which compensation will be awarded in respect of land injuriously affected by the construction of a railway and works, see *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. 229; *Ricket* v. *Metropolitan Rail. Co.*, L. R. 2 H. L. 175; *Hammersmith Rail. Co.* v. *Brand*, 4 H. L. 171; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243; *Caledonian Rail. Co.* v. *Walker's Trustees*, 7 App. Ca. 259; *Fleming* v. *Newport Rail. Co.*, 8 App. Ca. 265.

Mines and minerals

(*p*) By sect. 77 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), a railway company is not entitled to any mines or minerals under any land purchased by them, except only

ditaments, and all and singular other the premises hereby assured, UNTO AND TO THE USE of the said Company, their successors and assigns, free and discharged from all right of the said [*vendor*], his heirs and assigns, to pre-emption in respect of the said premises under the same Acts of Parliament or any of them; AND the said [*vendor*] hereby acknowledges [*acknowledgment and undertaking as to title-deeds, ut ante*, p. 381].

LII. Conveyance of Freeholds to Railway Company by Owner in Fee for a Gross Sum.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

LIII. *CONVEYANCE of* FREEHOLDS *to a* RAILWAY COMPANY *by a* TENANT FOR LIFE *in* CONSIDERATION *of a* RENT-CHARGE *determined by the* VALUATION *of two* SURVEYORS, *where the* COMPANY AGREES *by a Deed of even date with the Conveyance to* EXECUTE *and* MAINTAIN *certain* ACCOMMODATION WORKS (*q*).

THIS INDENTURE (*r*), made the —— day of ——, 18—, BETWEEN [*tenant for life*], of, &c., of the one part; Parties.

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such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, except as aforesaid, are to be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

(*q*) The 7th sect. of the Lands Clauses Consolidation Act, 1845, empowers persons under disability or being only limited owners of lands, including tenants for life and in tail, to sell and convey the same and to enter into all necessary agreements for that purpose on behalf, not only of themselves and their representatives, but also "for and on behalf of every person entitled in reversion, remainder, or expectancy after them, or in defeasance of the estates of such parties." There is, however, nothing in the section enabling a limited owner to bind any estates, interests, charges, or incumbrances having priority to the settlement or will creating the limited owner's estate: all persons holding any prior

Purchase by agreement from limited owners.

Note (*r*) next page.

LIII. Conveyance of Freeholds to a Railway Company by Tenant for Life for a Rentcharge.

and the —— Railway Company, &c. [see *ante*, p. 499], of the other part: WHEREAS, under or by virtue of an indenture of settlement dated, &c., and made, &c. (being the settlement made in consideration of the then intended marriage between the said [*tenant for life*] and [*wife*], which was shortly afterwards solemnised), the pieces of land and hereditaments hereby conveyed, together with other hereditaments, stand limited to certain uses, under which the said [*tenant for life*] is tenant for life in possession thereof with remainders over as therein mentioned; AND WHEREAS the said pieces of land and hereditaments hereby conveyed are required, &c. [*ut ante*, p. 499]; AND WHEREAS the Company have contracted with the said [*tenant for life*] for the absolute purchase of the said pieces of land and hereditaments in fee simple in possession free from incumbrances, subject to such reservation of mines and minerals as is hereinafter contained, And the Company

Recitals:
of settlement under which vendor is tenant for life;
of requisition to take lands;
of agreement for purchase of land, and valuation of rent-charges (*s*);

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estates, &c., as mortgagees, jointresses, &c., must convey their interests either by concurring in the conveyance by the limited owner or by an independent deed.

By sect. 14 of the above Act, the promoters of an undertaking are prohibited from purchasing and taking from a person under disability or limited owner a greater quantity of land than is prescribed by the special Act.

A tenant for life may, in exercise of the powers conferred by the Settled Land Act, 1882, sell and convey the fee to a company as to any other purchaser for a gross sum; but this Act contains no power for a limited owner to sell in consideration of a rent-charge.

Stamp.

(*r*) This conveyance will be chargeable with *ad valorem* duty on the total amount of the rent-charge payable during the twenty years next after the date of the instrument: see Stamp Act, 1870, sect. 72, *ante*, p. 370.

Assessment of compensation.

(*s*) By the Lands Clauses Consolidation Act, 1845, the purchase-money or compensation to be paid for lands purchased from persons under disability, and not having power to sell and convey except under the provisions of that Act, is to be ascertained by the valuation of two surveyors, or their umpire (except where determined by a jury, or by arbitration or by a surveyor appointed by the justices), and the amount so ascertained is to be paid into the Bank of England: see sects. 9, 69. If, however, the amount does not exceed 200*l.* but exceeds 20*l.*, it may be either paid into the Bank, or to trustees to be appointed by the limited owner or the person acting on behalf of the owner under disability: see sect. 71; and sums not exceeding 20*l.* may be paid to the parties themselves.

By the Lands Clauses Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), sect. 2, the power given by sect. 10 of the Lands Clauses Consolidation Act, 1845, to absolute owners of lands to

LIII. Conveyance of Freeholds to a Railway Company by Tenant for Life for a Rentcharge.

has agreed to pay, and the said [*tenant for life*] has agreed to accept as the consideration for the sale of the said pieces of land and hereditaments, an annual rent-charge of £—— by way of purchase-money, being the amount settled and determined (having regard to the agreement hereinafter recited or referred to, for the execution and maintenance by the Company of the accommodation works hereinafter mentioned), by the valuation in writing, dated, &c., of [A. B.], of, &c., and [C. D.], of, &c., two able practical surveyors, of whom one, the said [A. B.], was duly nominated by the said [*tenant for life*], and the other, the said [C. D.], was duly nominated by the Company pursuant to the provisions in that behalf contained in the said Lands Clauses Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, and also a further annual rent-charge of £——, being at the rate of five per cent. per annum on the gross sum estimated or fixed by the said valuation by way of compensation for damage which may be sustained by the said [*tenant for life*] or his successors in title, or done to any lands adjoining to the said pieces of land and hereditaments hereby conveyed by reason of the construction of the said railway, or the execution of the works of the Company upon the same pieces of land and hereditaments, or by reason of the severing of the same from the remainder of the lands of the said [*tenant for life*], or otherwise injuriously affecting such lands in exercise of the Special Act, or any of the Acts incorporated therewith; AND WHEREAS upon the treaty for the said purchase it was agreed that the company shall execute and maintain the several accommodation and other works hereinafter mentioned: AND WHEREAS by an indenture bearing even date with these presents and expressed to be made between the same parties as are parties

of agreement as to accommodation works;

of deed of covenant for execution, &c.,

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sell in consideration of a rent-charge, is extended to sales where the parties interested in the sale are under disability or have no power to sell and convey except under the last-mentioned Act. The amount of the rent-charge is to be settled in the manner directed in sect. 9 of the Act of 1845 (*supra*) in the case of a sale in consideration of a gross sum: see as to such valuation, *ante*, Vol. I., p. 441, sub tit. AGREEMENTS.

By the Railway Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), sect. 3, persons under disability are empowered to contract for the sale of lands to promoters before the incorporation of a railway company, but not to convey the lands.

LIII. Conveyance of Freeholds to a Railway Company by Tenant for Life for a Rentcharge.

hereto, and executed by them respectively immediately before the execution of these presents in pursuance of such last mentioned agreement, the company has covenanted with the said [*tenant for life*] to make and maintain the several roads, gates, culverts, drains, tunnels, crossings, and other accommodation and other works, the particulars whereof are specified in the first schedule hereunder written: AND WHEREAS [*recital of agreement for acknowledgment and undertaking as to title deeds in second schedule, ut ante, p.* 500]: NOW THIS INDENTURE WITNESSETH that in pursuance of the hereinbefore recited agreement in this behalf and in consideration of the several annual rentcharges of £—— and £—— hereinafter limited, the said [*tenant for life*] hereby grants and, as beneficial owner, conveys unto the Company and their successors ALL those several pieces or parcels of land [*describe parcels*]: EXCEPTING and reserving unto the said [*tenant for life*] and his successors in title, or other the persons who but for the conveyance hereby made, would for the time being be entitled to the possession or receipt of the rents and profits of the premises hereby conveyed, all mines, veins, seams, and beds of coal, cannel, and stone, and other mines and minerals, with full and free liberty and power to work, get, and carry away the same mines and minerals but by underground workings only, and not so as to authorise any entry upon, or confer any right or power to or over the surface of the pieces of land and premises hereby conveyed, making from time to time nevertheless to the company, their successors and assigns, reasonable compensation for any

of accommodation works (*t*);

of agreement as to title deeds.

Testatum.

Conveyance.

Reservation of mines and minerals (*u*).

(*t*) Where upon a treaty for the purchase of lands by a railway company the landowner requires the company to execute and maintain accommodation works, and the company consents to do so, the nature and extent of the works will be a matter of arrangement between the parties, having regard to the circumstances of the particular case. Such arrangement may, if desired, be effected by the insertion in the conveyance of covenants on the part of the company to execute and maintain the works; but the preferable course is to embody such covenants in a separate instrument, which will be delivered to and retained by the landowner. For a form of such a deed of covenant, see Precedent XI., sub tit. AGREEMENTS, *ante*, Vol. I., p. 450.

(*u*) Though an express reservation of mines, &c., is not strictly necessary, it is frequently introduced in order to declare the rights of the parties with regard to them by the conveyance.

damage which may be done or occasioned to the said railway or other works for the time being of the Company, other than by subsidence: To HOLD all the premises hereby conveyed except as aforesaid UNTO AND TO THE USE of the Company, their successors and assigns, YIELDING AND PAYING unto the said [*tenant for life*] and his assigns during his life, and after his decease to the person or persons entitled under or by virtue of the hereinbefore recited indenture of settlement, one annual rentcharge of £——, and one further or other annual rentcharge of £——, such rentcharges respectively to be payable by half-yearly payments on the —— day of ——, and the —— day of —— in every year, the first half-yearly payment to be made on the —— day of —— next, clear of all deductions except for income-tax, and to be chargeable, and the same rentcharges respectively are hereby charged upon the said pieces of land and premises hereby conveyed, and also on the tolls and rates of the railway and undertaking authorised by the Special Act. AND the Company hereby covenant with the said [*tenant for life*] to the intent that the benefit of this covenant may enure for the benefit of the person or persons for the time being entitled to the said rentcharges respectively, that they the Company, or their successors or assigns, will henceforth pay the said several rentcharges hereinbefore limited to the said [*tenant for life*], or the person or persons entitled as aforesaid, at the times and in manner hereinbefore appointed for payment of the same respectively, without any deduction except as aforesaid. [*Proviso limiting tenant for life's implied covenants for title*, if desired, *ante*, p. 435; *acknowledgment and undertaking as to title deeds, ut ante, p.* 381.]

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

LIII. Conveyance of Freeholds to a Railway Company by Tenant for Life for a Rentcharge.

Habendum.

Subject to rentcharges.

Covenant by company to pay rentcharges.

Acknowledgment, &c.

LIV. *CONVEYANCE of* Freeholds *to a* Railway Company *by a* Mortgagee *and a* Mortgagor *(owner in fee subject to the mortgage), the* Purchase-money *and* Compensation *being* determined *by a* Special Jury, *and paid to the Mortgagor with the Mortgagee's Consent* (*w*).

THIS INDENTURE, made the —— day of ——, 18—

Parties. Between [*mortgagee*], of, &c., of the first part; [*mortgagor*], of, &c., of the second part; and the —— Railway Company, &c. [*ut ante*, p. 499], of the third part:

Recitals: Whereas [*recite title of mortgagee and state of mortgage debt, ut ante*, p. 460; *and seisin of mortgagor subject to the mortgage; and requisition of company to take lands, ut ante, p.* 499, *mutatis mutandis*];

of service of notice to treat (*x*); And whereas the Company, in compliance with the provisions of the Lands Clauses Consolidation Act, 1845, duly served upon the said [*mortgagee*] and [*mortgagor*] respectively notices in writing demanding from them respectively the particulars of their respective estates and interests in the said piece of land so required by the Company as aforesaid, and stating the particulars of the same piece of land, and that the Company were willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that might be sustained by them by reason of the execution of the works of the Company:

of failure of owner to treat, and of notice by company of intention to summon a jury (*y*); And whereas the said [*mortgagee*] and [*mortgagor*] having failed or neglected for the space of twenty-one days and upwards subsequently to the service upon them respectively of the aforesaid notices, to state the particulars of their respective estates and interests in the said piece of land, and to treat with the Company in respect of the same, the Company, in further compliance with the provisions of the Lands Clauses Consolidation Act, 1845, before issuing their warrant for summoning a jury as hereinafter mentioned,

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(*w*) The provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), with regard to the purchase and taking of lands otherwise than by agreement, are contained in sects. 16 to 68 inclusive.

(*x*) As to giving and serving notices to treat for the purchase of lands required for the undertaking, see sects. 18 *et seq.* of the Lands Clauses Consolidation Act, 1845.

(*y*) See as to this notice sect. 38 of the Lands Clauses Consolidation Act, 1845.

LIV. Conveyance of Freeholds to a Railway Company on Compulsory Purchase.

duly gave to and served upon the said [*mortgagee*] and [*vendor*] respectively notices in writing of the intention of the Company to cause a jury to be summoned, stating in such notice that they were willing to give the sum of £—— for the estate or interest capable of being sold and conveyed by the said [*mortgagee*] and [*mortgagor*] respectively of and in the said piece of land and hereditaments, and the appurtenances thereto belonging, and the further sum of £—— for the damage to be sustained by the execution of the works of the said railway: And whereas on the —— day of ——, 18—, before the Company had issued the aforesaid warrant, the said [*mortgagor*], who did not agree to the offer contained in such last-mentioned notice, gave to the Company notice of his desire that the question in dispute should be tried before a special jury: And whereas in pursuance of the said several notices, and of the provisions of the Lands Clauses Consolidation Act, 1845, the Company on the —— day of ——, 18—, issued their warrant under their common seal upon the sheriff, requiring him to summon a jury to determine the amount to be paid by the Company for the purchase by them of the estate or interest capable of being sold or conveyed by the said [*mortgagee*] and [*mortgagor*] respectively of and in the said piece of land and hereditaments, and the appurtenances thereto belonging, and also the amount to be paid by the Company as compensation for the damage to be sustained by the execution of the works of the said railway, and by their said warrant the Company required the sheriff to summon a special jury for such trial: And whereas the sheriff thereupon, in pursuance of the provisions of the Lands Clauses Consolidation Act, 1845, summoned the said [*mortgagor*] and the Company to appear before him on the —— day of ——, 18—, at ——, for the purpose of nominating a special jury, and he then and there proceeded duly to nominate and strike a special jury, twenty of whom (the number of such jury having been duly reduced to the number of twenty as prescribed by the last-mentioned Act) were duly summoned to meet on the —— day of ——, 18—, at ——, and an inquiry for the purpose of the trial and adjudication of the matters in question as aforesaid was then and there duly held before [A. B.], of, &c., an under-sheriff,

of issue of warrant by company to sheriff to summon a special jury (*z*);

(*z*) A special jury may be summoned at the request of either party: see sect. 54 of the Lands Clauses Consolidation Act, 1845.

LIV. Conveyance of Freeholds to a Railway Company on Compulsory Purchase.

for the Company, and a special jury, consisting of twelve of the said twenty jurymen who first appeared on the names being called over; And the said special jury (having been first duly sworn) by their verdict, which, as well as the judgment of the said under-sheriff thereupon, was signed by him, and recorded by the clerk of the peace for the said county assessed or awarded [*here state the verdict*]: And whereas the Company have, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, tendered the said sums of £—— and £——, being the amounts so assessed or awarded by the said verdict as aforesaid, in respect of the purchase-money of the said piece of land and hereditaments and of compensation for damage respectively, and the said [*mortgagee*] and [*mortgagor*] have respectively agreed to accept the same amounts respectively: And whereas the said [*mortgagee*] being satisfied that the hereditaments comprised in the said mortgage other than the said piece of land and hereditaments hereby conveyed, are a sufficient security for the said mortgage debt of £—— and the interest thereon, has agreed that the whole of the said sums of £—— and £—— so assessed or awarded as aforesaid shall be paid to the said [*mortgagor*]: And whereas the deeds and writings specified in the schedule hereunder written relate not only to the piece of land and hereditaments hereby conveyed, but also to other hereditaments which still remain subject to the hereinbefore-recited indenture of mortgage; And it has been agreed between the parties that the said [*mortgagee*] shall give the acknowledgment hereinafter contained, and that the said [*mortgagor*] shall enter into the covenants on his part, also hereinafter contained: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreements, and in consideration of the sums of £—— and £—— respectively paid to the said [*mortgagor*] by the Company, with the consent of the said [*mortgagee*], testified by his execution of these presents, of which several sums of £—— and £——, making together the sum of £——, the said [*mortgagee*] and [*mortgagor*] hereby acknowledge the payment in manner aforesaid and receipt respectively, the said [*mortgagee*] hereby, at the request of the said [*mortgagor*], grants and as mortgagee conveys, and the said [*mortgagor*] grants and as beneficial owner conveys unto the Company and their successors all that [*describe parcels*]: To hold all the premises hereby conveyed Unto and to the use

of agreement as to deeds.

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of the Company, their successors and assigns, Freed and discharged from the said mortgage debt of £——, and all interest due or to accrue thereon under or by virtue of the said indenture of mortgage, and from all securities for the said mortgage debt and interest respectively: AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement, and in consideration of the premises, the said [*mortgagee*] hereby acknowledges the right of the Company to production and delivery of copies of the several deeds and writings specified in the schedule hereunder written: And the said [*mortgagor*] hereby covenants with the Company that he the said [*mortgagor*] will at the request of the Company, or any person or persons lawfully claiming under them, execute and do all such acts and things as by him or them may reasonably be required for procuring the production and delivery of copies of the said deeds and writings by the said [*mortgagee*], or any other person having possession or control thereof from time to time; And also that when and so soon hereafter as the said deeds and writings shall come into the possession or control of him the said [*mortgagor*], or any person or persons lawfully claiming under him, he or they will thenceforth keep the same deeds and writings safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

Acknowledgment (*a*).

Covenant.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

(*a*) The acknowledgment here given by the mortgagee, who retains possession of the documents, will run with the documents, and bind them in the hands of a transferee of the mortgage, or of the mortgagor, on payment off of the mortgage. A mortgagor is not in a position to give an undertaking, inasmuch as he does not "retain possession" of the documents; he should, therefore, enter into a covenant as in the text.

Mortgagor cannot give undertaking.

LV. CONVEYANCE *of* FREEHOLDS *to a* RAILWAY COMPANY *under the Lands Clauses Consolidation Act*, 1845, *by the* COMMITTEE *of a* LUNATIC, *by* DEED POLL (*b*).

TO ALL TO WHOM THESE PRESENTS SHALL COME [*committee*], of, &c., the committee of the estate of [*lunatic*], of, &c., a lunatic, sends greeting: WHEREAS [*recite seisin of lunatic, inquisition in lunacy, and appointment of committee, ut ante*, p. 479]. AND WHEREAS the said piece of land and hereditaments are required, &c. [*ut ante*, p. 499]. AND WHEREAS the said [*committee*] as such committee as aforesaid has agreed with the Company [*recite conditional contract for sale, order approving contract, and approval of conveyance by the Master in Lunacy, ut ante*, p. 480, *mutatis mutandis; and also agreement as to acknowledgement and undertaking as to title deeds, &c., ut ante*, p. 500]. NOW THESE PRESENTS WITNESS that in consideration of such payment as aforesaid by the Company of the said sum of £—— the said [*committee*], in exercise of the power by the Lands Clauses Consolidation Act, 1845, given to him in this behalf, hereby as such committee as aforesaid conveys unto the Company and their successors ALL that [*describe parcels*]: TO HOLD all the premises UNTO and TO THE USE of the Company, their successors and assigns: AND the said committee, as well on his own behalf as on behalf of the said [*lunatic*], acknowledges the right of the Company to the production of the title deeds and documents specified in the Schedule hereunder written, and on behalf of the said [*lunatic*], but not so as to impose any liability on the said [*committee*], personally undertakes for the safe custody of the same.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

(*b*) It may be observed that by sect. 7 of the above-mentioned Act, the powers of selling and conveying the lands of lunatics and of entering into agreements for such purposes is given to their committees, and are exercisable by such committees on behalf of the lunatics of whom they are committees to the same extent as such lunatics would have exercised the powers given by the Act if not under any incapacity; and accordingly it is the usual practice in conveyances under this Act to make the committees themselves convey, instead of making the lunatics convey acting by their committees as in ordinary conveyances of the lands of lunatics: see *ante*, Precedent XLVI., p. 479. This conveyance may of course be by indenture, if preferred.

LVI. DEED POLL *to vest* Freehold Lands *in a* Railway Company, *when the Owner Refuses to Convey* (*c*).

TO ALL TO WHOM THESE PRESENTS SHALL COME, the —— Railway Company, incorporated by the —— Railway Act, 18—, (hereinafter called the Company), sends greeting: Whereas the several pieces or parcels of land and hereditaments, described in the Schedule hereunder written, situate in the parish of ——, in the county of ——, are or are believed to be vested in [*owner*], of, &c., for an estate of fee-simple in possession; And whereas the said pieces of

Recitals: of supposed title of land-owner;

(*c*) By sect. 75 of the Lands Clauses Act, 1845, it is enacted as follows:—

"Upon deposit in the bank in manner hereinbefore provided" (see sect. 73), "of the purchase-money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, the owner of such lands, including in such term all parties by this Act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof, or if he fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll under their common seal, if they be a corporation, or if they be not a corporation under the hands and seals of the promoters or any two of them, containing a description of the lands in respect of which such default shall be made, and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made; and such deed-poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, or as between whom and the promoters of the undertaking such purchase-money or compensation shall have been determined by a jury, or by arbitrators, or by a surveyor appointed by two justices, as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the promoters of the undertaking, and as against such parties, and all parties on behalf of whom they are hereinbefore enabled to sell and convey, the promoters of the undertaking shall be entitled to immediate possession of such lands."

Stamp.

LVI. Deed Poll to Vest Freeholds in a Railway Company.

land and hereditaments are required for the purposes of the railway and undertaking of the Company, and by the said Act in which the Lands Clauses Consolidation Act, 1845, is incorporated, the Company is authorised and empowered to take and purchase the same for the purposes aforesaid: And whereas the company, pursuant to the said Lands Clauses Consolidation Act, 1845, sometime since duly served upon the said [*owner*] notice in writing that they required to purchase and take the said piece of land and hereditaments, and then demanded from him the particulars of his estate and interest in such hereditaments, and of the claims made by him in respect thereof, and stated the particulars of the same lands, and that they were willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that might be sustained by them by reason of the execution of the works of the said railway: And whereas the said [*owner*] having failed or neglected for the space of twenty-one days and upwards, subsequently to the service upon him of the said notice, to state the particulars of his claim in respect of the said pieces of land and hereditaments and to treat with the Company in respect thereof, they in further compliance with the directions of the said Lands Clauses Consolidation Act, 1845, before issuing their warrant for summoning a jury, as hereinafter mentioned, duly gave unto and served upon the said [*owner*] a notice in writing of the intention of the Company to cause a jury to be summoned, stating in such notice that they were willing to give the sum of £—— for the fee simple in possession, free from incumbrances, so believed to be vested in the said [*owner*] as aforesaid for the estate or interest capable of being sold and conveyed by the said [*owner*] of and in the said pieces of land and hereditaments and the appurtenances thereto belonging, and the further sum of £—— for the damage to be sustained by the said [*owner*] by the execution of the works of the said railway: And whereas the said [*owner*] having refused to accept the said sums of £—— and £——, the Company, in pursuance of the said notice in that behalf and under the provisions of the said Lands Clauses Consolidation Act, 1845, on or about the —— day of ——, 18—, served upon the sheriff of the county of—— their warrant under their common seal, whereby they required the said sheriff to summon a jury to determine the sum of money to be paid by the said company for the pur-

of notice of intention to take lands;

of failure of owner to treat for sale; and notice of intention to summon a jury;

of issue of warrant to sheriff to summon a jury;

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chase by them of the estate or interest capable of being sold and conveyed by the said [*owner*] of and in the said pieces of land and hereditaments, and the appurtenances thereto belonging, and also the sum of money to be paid by the Company for the damage, if any, to be sustained by the said [*owner*] by the execution by the works of the said —— Railway Act, 18—, authorised to be executed: AND WHEREAS the said sheriff, upon the receipt of the said warrant, summoned a jury of twenty-four duly qualified persons as jurymen to meet at —— on the —— day of ——, 18—, and he forthwith gave due notice of the time and place so appointed by him to the Company, who also gave due notice, in writing, thereof to the said [*owner*]: AND WHEREAS pursuant to the said appointment and summons an enquiry was duly held at the time and place aforesaid before ——, one of the under-sheriffs of the said county of ——, and a jury of twelve persons drawn by him out of the said twenty-four jurymen summoned as aforesaid, and the said jury (having been first duly sworn) by their verdict which as well as the judgment of the said under-sheriff thereupon was signed by him and recorded to the clerk of the peace for the said county, assessed or awarded [*here insert verdict*]: AND WHEREAS in further compliance with the provisions of the said Lands Clauses Consolidation Act, 1845, the Company on the —— day of ——, now last past, paid the sum of £—— (being such purchase or consideration money as aforesaid) and the sum of £—— sterling (being such compensation as aforesaid) into the Bank of England in the name and with the privity of the Paymaster-General of the Chancery Division of the High Court of Justice to his account there, "*Ex parte* the —— Railway Company in the matter of the —— Railway Act, 18—," as appears by the receipt in writing dated the —— day of —— of the cashier of the said bank: AND WHEREAS the Company have since requested the said [A. B.] to convey to them the said piece of lands and other hereditaments described or referred to in the Schedule hereunder written, but he hath neglected or refused so to do:

of summoning of jury, and notices as to time and place of inquiry;

of meeting of jury and verdict;

of payment of the purchase and compensation money into the Bank of England (*d*);

of vendor's refusal to convey.

(*d*) The compensation-money when ascertained must be paid into the bank as prescribed by the Act; otherwise this instrument, which derives its efficacy solely from the Act, would be inoperative as a deed-poll under the Act to vest the estate in the Company: see sects. 75, 76 and 77 of the Act.

LVI. Deed Poll to Vest Freeholds in a Railway Company.

Testatum.

NOW THESE PRESENTS WITNESS that in exercise of the power or discretion given to the Company for this purpose by the said Lands Clauses Consolidation Act, 1845, They the Company Do by this deed poll executed by and under the common seal of the said Company declare that the said —— Railway Company have purchased or taken the pieces of land and other hereditaments particularly described or referred to in the Schedule hereunder written, and all the appurtenances thereto belonging or in anywise appertaining; that [A. B.] is the name of the person from whom the same hereditaments have been purchased or taken; that the sums of £—— sterling and £—— sterling have been deposited in the Bank of England in respect thereof, and that the said [*owner*] has made default in duly conveying the same hereditaments pursuant to the Lands Clauses Consolidation Act, 1845; And the Company make this declaration to the intent that under or by virtue of the said Lands Clauses Consolidation Act, 1845, All the estate and interest in the said pieces of land and hereditaments hereinbefore described which is capable of being sold and conveyed, may vest absolutely in the Company, their successors and assigns, And that the Company may become and be entitled to the immediate possession of the same premises in fee simple: IN WITNESS whereof the said Company have hereunto attached their common seal the —— day of ——, 18—.

THE SCHEDULE ABOVE REFERRED TO.

LVII. CONVEYANCE *of* COPYHOLDS *to a* RAILWAY COMPANY *to accompany a* CONVEYANCE *of* FREEHOLDS *of even date.*

Conveyance.

KNOW ALL MEN BY THESE PRESENTS that I [*the vendor*], of, &c., in consideration of the sum of £—— paid to me by the —— Railway Company, which sum of £—— is for the purpose of these presents and the *ad valorem* duty payable thereon, the apportioned or estimated price of the copyhold hereditaments hereby conveyed as appears more fully by an indenture of even date herewith and made, &c.,

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whereby certain freehold hereditaments therein mentioned were conveyed by me to the said Company, do hereby in exercise of the powers in this behalf given to me by the —— Railway Act, 18—, and the Public Acts incorporated therewith as beneficial owner convey to the said Company [*describe parcels*]: To HOLD the premises to [and to the use of] the said Company, their successors and assigns, for ever according to the true intent and meaning of the said —— Railway Act, 18—: NEVERTHELESS, until the said pieces or parcels of land and other hereditaments which are parcel and holden by copy of Court Roll of the manor of ——, in the county of ——, shall have been enfranchised by virtue of the powers contained in the Lands Clauses Consolidation Act, 1845, subject to the same fines, rents, heriots, and services as have heretofore been payable, and of right accustomed in respect of the same premises (*e*).

Habendum.

Subject to fines, &c.

IN WITNESS, &c.

(*e*) Sects. 95–98 of the Lands Clauses Consolidation Act, 1845, contain provisions as to the conveyance of copyholds. This conveyance must be entered on the rolls of the manor, and the steward on payment to him of the customary fees must enrol the same; the conveyance when so enrolled is to have the like effect in respect of the copyholds or customary lands as if the same had been freeholds, except that until enfranchisement they are to continue subject to fines, &c.: see sect. 95 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18). Having regard to the necessity of enrolment, it is expedient that copyholds should be conveyed by a separate instrument, and that all necessary or advisable recitals should be contained in the conveyance of the freeholds.

Enrolment of conveyance.

By sect. 96 of the same Act it is enacted that within three months after enrolment of the conveyance, or within one month after entry on the land, whichever shall first happen, the Company are to procure the enfranchisement of the land; and by sect. 97 the lord of the manor is to enfranchise the same on payment of compensation as agreed upon or ascertained by valuation; and in case of the lord's default, or if he fails to deduce a good title, the company may enfranchise the land, by depositing the compensation-money in the prescribed manner, and executing a deed-poll duly stamped in the manner provided in the case of the purchase of lands: see *ante*, Precedent LV., p. 511.

Enfranchisement.

This Precedent closely follows the form given in Schedule A. of the Act, in which the words in brackets are omitted.

LVIII. Assignment of Leaseholds to a Railway Company by Guardian of an Infant.

LVIII. Assignment *of* Leaseholds *to a* Railway Company *by the* Guardian *of an* Infant, *the Land sold being* Part *of* Premises *comprised in the Lease, where the* Compensation *money is* Determined *by* Arbitrators, *and the* Rent *is* Apportioned *by two* Justices.

THIS INDENTURE, made the —— day of ——, 18—,

Parties. Between [*vendor*], of, &c., acting on behalf of, as such guardian hereinafter mentioned, [*infant*], of, &c., an infant under the age of twenty-one years, of the one part, And the —— Railway Company, &c. [*ut ante*, p. 499], of the other part:

Recitals: of lease; Whereas by an indenture of lease, dated, &c., and made, &c., All that [*describe parcels from lease*] were demised to the said [*lessee*], his executors, administrators, and assigns, for the term of —— years, at the yearly rent of £——, and subject to the covenants on the lessee's part, and conditions therein contained:

of mesne assignments; And whereas by divers mesne assignments and acts in the law, and ultimately by an indenture, dated, &c., and made, &c., the premises comprised in the said indenture of lease became vested in [*testator*], the father of the said [*infant*], for the then residue of the said term of ——years:

And whereas [*recite will of father of infant devising and bequeathing all his real and personal estate subject to legacies, &c., to the infant absolutely, and appointing the vendor to be guardian of the infant; death of testator and probate of his will*]:

of power of Company to take lands; And whereas the piece or parcel of land hereinafter described and hereby assigned being part of the premises comprised in the said indenture of lease are required by the Company for the purposes of their railway and undertaking, and the Company are authorised by the Special Act and by the Lands Clauses Consolidation Act, 1845, and other Acts incorporated with the Special Act or some of them, to take for the purpose of their railway and undertaking the said piece or parcel of land:

And whereas the Company in compliance, &c. [*recite notice to treat, ut ante*, p. 506]:

of proceedings relating to arbitration; And whereas the said [*vendor*] and the Company being unable to agree as to ascertaining the compensation to be paid to the said [*vendor*] for damage to be sustained by reason of the said railway and works of the Company, the said [*vendor*] served upon the Company a notice requiring the amount of such compensation as aforesaid to be determined by arbitration, pursuant to the provisions of the Lands

LVIII. Assignment of Leaseholds to a Railway Company by Guardian of an Infant.

Clauses Consolidation Act, 1845: AND WHEREAS the Company having refused to concur in the appointment of a single arbitrator [A. B.], of, &c., and [C. D.], of, &c., were duly appointed by the said [*vendor*], and the Company respectively pursuant to the provisions of the last mentioned Act to be the arbitrators on their respective parts to whom the question of the said disputed compensation should be referred: AND WHEREAS the said [A. B.] and [C. D.], having duly appointed an umpire and severally made and subscribed the declarations prescribed by the last mentioned Act, by their award, to which the said declarations are annexed, dated the —— day of ——, 18—, fixed the compensation money to be paid by the Company to the said [*vendor*] for damage to be sustained by him by reason of the said railway and works of the Company at the sum of £——; and they thereby further awarded that such compensation money should be in full satisfaction of all accommodation works which might otherwise be required to be executed by the Company under any of the Acts hereinbefore mentioned or referred to in respect of any lands of the said [*vendor*] adjoining the said piece or parcel of land hereinafter described and hereby assigned: AND WHEREAS [E. F.], of, &c., Esquire, and [G. H.], of, &c., Esquire, two of Her Majesty's justices of the peace for the county of —— aforesaid, have pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, in that behalf determined that the apportioned yearly rent to be paid by the Company in respect of the said piece or parcel of land hereinafter described and hereby assigned shall be the sum of £——: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— paid to the said [*vendor*] by the Company, of which sum the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby assigns, and conveys, unto the Company, ALL THAT piece or parcel of land, &c. [*describe parcels*]: TO HOLD all the premises unto the Company, their successors and assigns, henceforth for the residue of the said term of —— years, subject nevertheless to the payment of the said apportioned yearly rent of £—— quarterly on the days and in the manner on and in which the whole rent reserved by the said indenture of lease is made payable, and also subject to the covenants on the part of the said lessee contained in the said indenture of lease, so far only as they relate to the said piece or parcel of land and premises hereby assigned, or such of the same covenants

of award;

of apportionment of rent.

Testatum.

Conveyance.

Habendum.

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and conditions as are henceforth to be observed and performed; And the said [*vendor*] hereby covenants with the Company, &c. [*covenants to pay apportioned rent, and to observe and perform covenants and conditions of lease so far as relates to land retained by him, and to indemnify the Company, ut ante*, p. 397; *and acknowledgment and undertaking as to lease and other documents of title, ut ante*, p. 472, *mutatis mutandis* (*f*)].

IN WITNESS, &c.

LIX. CONVEYANCE *of* FREEHOLDS *by an* OWNER IN FEE *to a* SCHOOL BOARD, *under the Elementary Education Act*, 1870, *where the Owner* DEMANDS *that the* BOARD *shall* TAKE *the* WHOLE *of a Piece of Land, Part only of which is Required for the Purpose of the Board* (*g*).

THIS INDENTURE, made the —— day of ——, 18—, Parties. BETWEEN [*vendor*], of, &c., of the one part, and The School

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(*f*) If desired covenants by the Company for payment of rent and indemnity, so far as relates to the land taken, may be here inserted, but the provisions contained in sect. 119 of the Lands Clauses Consolidation Act, 1845, seems to render this insertion superfluous and unnecessary.

Powers of School Board for providing schools.

(*g*) The Elementary Education Act, 1870 (33 & 34 Vict. c. 75), sect. 19, confers on every school board powers of providing, by building or otherwise, school-houses properly fitted up, and of purchasing and taking on lease any land or right over any land. And by sect. 20 of the same Act it is enacted as follows:—

Compulsory purchase of sites.

"(1.) The Lands Clauses Consolidation Act, 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section, the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the school board, and land shall be construed to include any right over land."

Sub-sects. (2) to (8) contain regulations as to the purchase and taking of land otherwise than by agreement, with respect to the publication and service of notices, presentation in certain cases of petitions to the Education Department for an Order authorising school boards to exercise their powers, the making of such orders by the Department and the confirmation thereof by Parliament, and with respect to the costs of such proceedings. And the section concludes as follows:—

"The School Sites Acts as defined in the fourth schedule to this Act" (*i.e.* the stats. 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13

LIX. Conveyance to a School Board.

Board for ——, in the county of ——, incorporated under the Elementary Education Act, 1870, of the other part: WHEREAS the said [*vendor*] is seised of or entitled to the messuage or dwelling-house, with the garden thereto belonging and hereditaments hereinafter described and hereby conveyed in fee simple in possession free from incumbrances: AND WHEREAS the strip of land delineated on the plan drawn in the margin of these presents, and therein coloured ——, being part of the said garden belonging to the said messuage and hereditaments hereinafter described and hereby conveyed is required by the said School Board for the purposes of an Elementary School, intended to be erected by them pursuant to the provisions of the said Act, and the said School Board are authorised by the said Act and by an Order in Council, dated, &c., issued pursuant to the same Act, to take the said strip of land for the purposes of the said School, and the said School Board accordingly requested the said [*vendor*] to sell and convey the same to them: AND WHEREAS the said [*vendor*] refused to treat with the said School Board for the sale to them of the said strip of land, unless the said School Board would purchase and take, and he accordingly required them to purchase and take the entirety of the said messuage or dwelling-house and the garden thereto belonging and hereditaments herein-

Recitals:
of vendor's seisin;
of requisition to take strip of land;
of requisition by vendor for purchase of entirety of house and land.

Vict. c. 49; and 14 & 15 Vict. c. 24), "shall apply in the same manner as if the school board were trustees and managers of a school within the meaning of those Acts, and land may be acquired under any of the Acts mentioned in this section, or partly under one and partly under another Act."

There therefore seems to be no necessity for the interposition of trustees in a conveyance of land to a school board.

See also as to compulsory purchase, sect. 15 of the Elementary Education Act, 1873 (36 & 37 Vict. c. 86).

As to the purchase of land by the managers of a public elementary school, see sect. 20 of the Act of 1870.

Enrolment in mortmain.

The conveyance need not be enrolled in mortmain unless the land purchased exceeds two acres in extent: see 31 & 32 Vict. c. 44; nor apparently in any case: see powers of re-sale given by sect. 22 of the Act of 1870, and see *Burnaby* v. *Barsby*, 4 H. & N. 690.

By sect. 92 of the Lands Clauses Consolidation Act, 1845, "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole." The case in the text is covered by the decision in *King* v. *Wycombe Rail. Co.*, 28 Beav. 104: for other cases in which railway companies have been compelled to take the whole of a "house or other building or manufactory," see *ante*, p. 88.

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after described and hereby conveyed: And whereas the said School Board have consented to comply with the requisition of the said [*vendor*], and they have accordingly agreed with him for the absolute purchase of the entirety of the said messuage or dwelling-house, garden and hereditaments in fee simple, free from incumbrances, at the price of £——: NOW

Testatum.

THIS INDENTURE WITNESSETH, that in pursuance

Conveyance.

of the said agreement and in consideration of the sum of £—— paid to the said [*vendor*] by the said School Board, of which sum the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby as beneficial owner conveys unto the said School Board and their successors, All that [*describe parcels, house and garden, ut ante*, p. 390], Unto and to the use of the said School Board, their successors and assigns.

In witness, &c.

LX. CONVEYANCE *of* Freeholds *subject to an* Annual Charge *to a* Municipal Corporation *under the* Public Health Act, 1875, *by* Trustees *for Sale under a* Will (*h*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, Between [*trustees*], of, &c., of the one part, and the Mayor, Aldermen, and Burgesses of the borough of ——, of the other part: Whereas [*testator*], late of, &c., deceased, made his will dated, &c., and thereby after specifically devising certain hereditaments in the county of ——, which did not include any part of the lands and hereditaments hereby conveyed, and after bequeathing certain legacies therein mentioned devised and bequeathed all his real and personal estate whatsoever and wheresoever to [*trustees*], their heirs, executors, adminis-

Recitals: of title of vendors;

(*h*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), contains provisions with regard to the acquisition of lands by local authorities for the purposes of the Act: see sects. 173 to 181 inclusive.

LX. Conveyance to Municipal Corporation under Public Health Act, 1875.

trators, and assigns, Upon trust that they or the survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns should sell and dispose of the same in manner therein mentioned, And appointed the said [*trustees*] his executors: AND WHEREAS [*recite death of testator and probate of his will*]: AND WHEREAS the said [*testator*] died seized of the said lands and hereditaments hereby conveyed for an estate in fee simple in possession, subject nevertheless as to the lands and hereditaments secondly hereinafter described to the annual sum of £5 hereinafter mentioned: AND WHEREAS the said Mayor, Aldermen, and Burgesses, acting by the council as the Urban Sanitary Authority for the borough of ——, being under and by virtue of the Public Health Act, 1875, and a provisional order of the Local Government Board, duly confirmed by the Local Government Boards Provisional Orders Confirmation Act, 18—, authorised and requiring to purchase and take (among other hereditaments) the said lands and hereditaments hereby conveyed for the purpose of making certain new streets and widening, and otherwise improving certain streets within the said borough, the said [*trustees*] in execution of the trust for sale contained in the hereinbefore recited will, have agreed with the said Mayor, Aldermen, and Burgesses for the sale to them for the sum of £—— of the said lands and hereditaments, and the inheritance thereof in fee simple, free from incumbrances, except the tenancies specified in the Schedule hereunder written, and also except as regards the lands and hereditaments hereinafter secondly described the sum of £5 per annum payable to the churchwardens of the parish of —— for the use of the poor of that place: NOW THIS INDENTURE WITNESSETH, that for effectuating the said agreement and in consideration of the sum of £—— now paid to the said [*trustees*] by the said Mayor, Aldermen, and Burgesses, of which sum of £—— the said [*trustees*] hereby acknowledge the receipt, the said [*trustees*] hereby as trustees convey unto the said Mayor, Aldermen, and Burgesses, ALL AND SINGULAR the several pieces and parcels of land which, together with the respective tenancies thereof, are severally specified and described in the said Schedule hereunder written: TO HOLD all the same premises unto and to the use of the said Mayor, Aldermen, and Burgesses, their successors and assigns, for ever, for the purposes of the Public Health Act,

of agreement for sale of lands to corporation.

LX. Conveyance to Municipal Corporation under Public Health Act, 1875.

1875, and of the said Provisional Order, subject nevertheless to the tenancies mentioned in the said Schedule, and to the said annual sum of £5, so far as such lands and hereditaments respectively are affected thereby.

In witness, &c.

The Schedule hereinbefore referred to.

LXI. CONVEYANCE *of* Freeholds *under a* Power of Sale *to the* Corporation *of a* Borough *for the purpose of Enlarging a* Public Park, *with* Reservation of Mines, *and* Covenants *as to the* User *of the Land* (*i*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, Between [*trustees*], of, &c., of the first part, [*tenant for life*], of, &c., of the second part, and the Mayor, Aldermen, and Burgesses, of the borough of —— of the third part:

Recitals: of title of vendor; of agreement for purchase of lands.

Whereas [*recite settlement with powers of sale by the trustees thereof with the consent of the tenant for life, and power to sell surface apart from mines*]: And whereas the said [*trustees*], in execution of the said power of sale contained in the hereinafter recited indenture of settlement with the consent of the said [*tenant for life*], have agreed to sell, and the said Mayor, Aldermen, and Burgesses in exercise of the powers in that behalf given to them by the Improvement Act and the public Acts incorporated therewith, have agreed to purchase the said lands and hereditaments hereby conveyed in fee simple free from incumbrances, but subject to the reservations and conditions hereinafter contained, at the price of £——: NOW

Testatum. Conveyance.

THIS INDENTURE WITNESSETH, that for effectuating the said sale and in consideration of the sum of £—— now

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(*i*) By sect. 164 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), urban authorities are empowered to purchase or take on lease, &c., lands for the purpose of being used as public recreation grounds.

paid to the said [*trustees*] by the said Mayor, Aldermen, and Burgesses, of which sum of £—— the said [*trustees*] hereby acknowledge the receipt, the said [*trustees*], with the consent of the said [*tenant for life*], hereby as trustees convey unto the said Mayor, Aldermen, and Burgesses, ALL that [*describe parcels*], reserving unto the said [*trustees*], their heirs and assigns, ALL mines and minerals within and under the said lands and hereditaments, with full and free liberty and power to and for the said [*trustees*], their heirs and assigns, and other the person or persons who under the said indenture of settlement shall be or become entitled to the said mines and minerals or any part thereof, and his or their present or future lessees or tenants, or any other person or persons by his or their or any of their authority at all times hereafter, but without entering upon the surface of the said lands and hereditaments, or any part thereof, to mine, work, pit and carry away the said mines and minerals, whether the surface of the said lands and hereditaments or any part thereof be thereby depressed or lowered or otherwise damaged, the said [*trustees*], their heirs and assigns, or other the owners or owner for the time being of the said mines and minerals as aforesaid, not being responsible for or liable to make any compensation whatsoever in respect of any damage that may be caused or occasioned by such mining, working, pitting, and carrying away to the surface of the said lands and hereditaments or any part thereof, or to any building or erection whether ornamental or otherwise, or to any ornamental or other water, pond, or lake which may from time to time hereafter be erected, placed, or made thereon or on any part thereof: To HOLD all the same premises UNTO AND TO THE USE of the said Mayor, Aldermen, and Burgesses, their successors and assigns, for ever, subject nevertheless to the conditions and stipulations hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that the said Mayor, Aldermen, and Burgesses hereby covenant with the said [*trustees*], or other the owners or owner for the time being of the said mines and minerals, as follows, that is to say:—

LXI. Conveyance to Municipal Corporation for a Public Park.

Reservation of mines, with limited powers of working.

1. The said lands and hereditaments shall be used as and for an enlargement of the public park in the borough of ——, known as the —— Park, and for no other purpose whatsoever.

Lands to be used as public park.

2. No road which may be made through or over the said

As to roads,

LXI. Conveyance to Municipal Corporation for a Public Park.

lands and hereditaments or any part thereof shall be used otherwise than for the purposes of the said park.

As to buildings.

3. No building of a permanent character shall be erected or built upon the said lands and hereditaments or any part thereof, except such lodges as may be reasonably necessary for the purposes of the said park.

As to compensation for damage to mines, &c.

4. The said Mayor, Aldermen, and Burgesses shall not at any time use the said lands and hereditaments or any part thereof, or do or permit or suffer any act thereon so as to render dangerous or otherwise interfere with the mining, working, pitting, and carrying away of the said mines and minerals, and shall be responsible for and liable to make full compensation to the said [*trustees*], their heirs and assigns, or other the owners or owner for the time being of the said mines and minerals for any damage to or interference with the said mines and minerals and the mining, working, pitting, and carrying away thereof by reason or in consequence of any branch of this stipulation.

As to fences.

5. The said Mayor, Aldermen, and Burgesses shall forthwith erect and for ever hereafter maintain good and substantial fences or walls of solid brick or stone of a minimum height of —— feet, with iron railings of good and substantial workmanship, and of an ornamental character, the whole height of such fences not being less than —— feet on the northerly, easterly, and southerly sides of the said lands and hereditaments, so as to effectually fence off the said lands and hereditaments from the roads adjoining thereto.

In witness, &c.

LXII. *FEOFFMENT by a* Municipal Corporation *to a Purchaser* (*k*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, Between the Mayor, Aldermen, and Citizens [*or* Burgesses (*l*)] of the City [*or* Borough] of T., in the County of

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(*k*) As to feoffments by municipal corporations, see *ante*, p. 3.

(*l*) The style of all boroughs within the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, is declared to be "the mayor, aldermen, and burgesses of such borough" (sect. 6); and of all cities within

LXII. Feoffment by Corporation.

——, of the first part; [*treasurer*], of, &c. (the Treasurer of the said City), of the second part; [*commissioners*] (three of the Lord Commissioners of her Majesty's Treasury), of the third part; [*purchaser*], of, &c., of the fourth part; and [*attorney to deliver seisin*), of, &c., of the fifth part: WHEREAS (*m*) the council of the said City of T., deeming it expedient to sell the hereditaments hereinafter described, (whereof the corporation of the said City was then and now is seised for an estate in fee-simple in possession free from incumbrances), did (in pursuance of a resolution in that behalf duly passed), by memorial, represent the circumstances of the case to the Lords Commissioners of her Majesty's Treasury: AND WHEREAS due notice of the intention of the council to make such application as aforesaid was fixed to the outer door of the town hall of the said City one calendar month before such application, and a copy of the memorial intended to be sent to the said Lords Commissioners, and so sent as aforesaid, was kept in the town clerk's office during such calendar month, and was freely open to the inspection of every burgess at all reasonable hours during the same month: AND WHEREAS the said Council have, with the approbation of the said Lords Commissioners, parties hereto, (testified by their execution of these presents) contracted with the said [*purchaser*] for the sale to him of the said hereditaments hereinafter described, free from incumbrances, at the price of £——: NOW THIS INDENTURE WITNESSETH, that, in consideration of £—— paid by the said [*purchaser*] to the said [*treasurer*], as such treasurer (the payment and receipt whereof the parties hereto of the first part and the said [*treasurer*] hereby acknowledge respectively), the said Mayor, Aldermen, and Citizens [*or* Burgesses], with the approbation of the said Lords Commissioners, testified as aforesaid, Do (*n*) by these presents grant and enfeoff unto

Recitals:

of resolution of town council to sell, and memorial to the Lords Commissioners;

of notice of application;

of agreement for sale.

Testatum.

In consideration of £—— paid to treasurer,

the mayor, &c., enfeoff the purchaser.

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the Act, "the mayor, aldermen, and citizens of such city" (sect. 142).

(*m*) With regard to this recital, see 5 & 6 Will. 4, c. 76, sect. 96; and 6 & 7 Will. 4, c. 104, sect. 2.

(*n*) The use of the words of conveyance in the past tense originated with charters of feoffment, and is sometimes proper in them; but where the deed contemplates a future livery of seisin, and contains a power of attorney for that purpose, these words are as out of place as in a conveyance by bargain and sale, release, or grant.

As to words in conveyance in the past tense.

LXII. **Feoffment by a Corporation.**

Parcels, general words, and estate clause.

the said [*purchaser*] and his heirs ALL [*parcels*], Together with all buildings, fixtures, lights, commons, mines, minerals, fences, ways, watercourses, easements, and appurtenances whatsoever, to the said hereditaments or any of them appertaining, or with the same or any of them now or heretofore enjoyed, or reputed as part thereof or appurtenant thereto; and all the estate, right, title, possession, interest, property, claim, and demand whatsoever, both at law and in equity, of the said Mayor, Aldermen, and Citizens, in, to, or upon the said hereditaments, and premises, and every or any part thereof (*o*), TO HAVE AND TO HOLD the said hereditaments and premises unto the said [*purchaser*], his heirs and assigns:

Habendum.

Covenants for title.

AND the said Mayor, Aldermen, and Citizens, for themselves and their successors (*p*), do hereby covenant and agree with the said [*purchaser*], that (notwithstanding any act, deed, matter, or thing by them the said Mayor, Aldermen, and Citizens, or their predecessors, made, done, permitted, or suffered to the contrary), they the said Mayor [*covenants for title, &c., ut ante*, p. 381, note (*j*), substituting "predecessors" for "ancestors or testators"]: AND the said Mayor, Aldermen, and Citizens do hereby appoint the said [*attorney*] the lawful attorney for them the said Mayor, Aldermen, and Citizens [*or* Burgesses], and in their name and stead forthwith or at any time hereafter to enter into and upon and take possession and seisin of the said hereditaments and premises, or of some part thereof in the name of the whole, and then to deliver seisin of all the said hereditaments and premises, or of some part thereof in the name of the whole, unto the said [*purchaser*] or his attorney, lawfully authorized, according to the form and intent of these presents.

Appointment of attornies to deliver and receive seisin.

IN WITNESS, &c.

(*o*) A feoffment is not a conveyance and is not within the meaning of the Conveyancing and Law of Property Act, 1881: see sect. 2 (v.). It is therefore necessary to insert the "general words" in the usual manner. And as a feoffment is not a deed by which any estate passes, nor are there any conveying parties to it: It therefore appears necessary to retain "all the estate" clause notwithstanding sect. 63 of the statute.

(*p*) The Conveyancing and Law of Property Act, 1881, does not appear to provide for the case of covenants by a corporation, and therefore, so far as the corporation is concerned, it would seem proper to retain the forms in use before the Act.

LXIII. *MEMORANDUM of* LIVERY *of* SEISIN *by* ATTORNEY.

LXIII. Memorandum of Livery of Seisin.

Memorandum of livery of seisin by attorney.

BE IT REMEMBERED, that, on the ——day of ——, and year within written, the within-named [*attornies to deliver seisin, or one of them, as the case may be*], by virtue of the letter of attorney within contained in that behalf, did for the within-named [*feoffors*], and in their name, enter into and upon the within-mentioned piece or parcel of land, and take and have full and peaceable possession and seisin thereof; And afterwards the like full and peaceable possession and seisin thereof, for them the said [*feoffors*], and in their name, did deliver to the within-named [*attornies to receive seisin, or one of them, as the case may be*], the attornies [*or* attorney] of the within-named [*feoffee*] within appointed in that behalf; To HOLD unto the said [*feoffee*], and his heirs, for ever, To the use and according to the tenor, form, and effect of the within-written indenture, in the presence of us.

[*Witnesses*].

[*Attornies*].

LXIV. *CONVEYANCE by* FIRST *and* SECOND MORTGAGEES *and* TRUSTEE *in* BANKRUPTCY *of* MORTGAGOR *of* MANOR *and* LARGE ESTATE, *to a* PURCHASER.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*first mortgagee*], of, &c., of the first part; [*second mortgagee*], of, &c., of the second part; [*trustee in bankruptcy*] of the third part, and [*purchaser*], of, &c., of the fourth part; WHEREAS by an indenture, dated the 7th day of April, 1876, and made between [*mortgagor*] of the one part, and the said [*first mortgagee*] of the other part, in consideration of the sum of 30,000*l.* then paid by the said [*first mortgagee*] to the said [*mortgagor*], the hereditaments hereinafter described were conveyed by the said [*mortgagor*] to the use of the said [*first mortgagee*], his heirs and assigns, subject to a proviso for the

Parties.

Recitals: of first mortgage;

LXIV. Conveyance by Mortgagees and Trustee in Bankruptcy.

redemption of the said hereditaments, upon payment to the said [*first mortgagee*] of the sum of 30,000*l.*, with interest for the same at the rate and on the day therein mentioned: And whereas by an indenture, dated the 2nd day of September, 1878, and made between the said [*mortgagor*] of the one part, and the said [*second mortgagee*] of the other part, in consideration of the sum of 3,000*l.* then paid to the said [*mortgagor*] by the said [*second mortgagee*], he the said [*mortgagor*] granted the said hereditaments, subject to the said indenture of the 7th day of April, 1876, and the principal moneys and interest intended to be thereby secured, unto and to the use of the said [*second mortgagee*], his heirs and assigns, subject to a proviso for redemption of the said hereditaments, upon payment to the said [*second mortgagee*], his executors, administrators, or assigns, of the sum of 3,000*l.*, with interest for the same at the rate and on the day therein mentioned:

of second mortgage;

of petition in bankruptcy;

And whereas on the —— day of ——, 18—, the said [*mortgagor*] presented in Her Majesty's High Court of Justice in Bankruptcy a bankruptcy petition, alleging his inability to pay his debts, and by an order of the said Court, dated the —— day of ——, 18—, and made by ——, one of the registrars of the said Court, the said [*mortgagor*] was adjudicated bankrupt on such petition:

of appointment of trustee;

And whereas at a meeting of the creditors of the said [*mortagor*], held on the —— day of ——, 18—, the said [*trustee*] was duly appointed trustee for the purposes of the said bankruptcy:

of contract for sale, and state of mortgage debts;

And whereas the said [*trustee*] as such trustee as aforesaid has agreed to sell to the said [*purchaser*], for the sum of 40,000*l.*, the fee simple in possession of the said hereditaments, free from incumbrances: And whereas there is now owing to the said [*first mortgagee*], on the security of the said indenture of the 7th day of April, 1876, the principal sum of 30,000*l.* only, and to the said [*second mortgagee*], on the security of the secondly hereinbefore recited indenture of the 2nd day of September, 1878, the principal sum of 3,000*l.* only, and it has been agreed that the said sums shall be paid out of the said purchase-money:

of arrangement as to custody of the second mortgage.

And whereas the said indenture of the 2nd day of September, 1878, relates as well to other property as the said hereditaments hereinafter conveyed, and it has been agreed that the same shall be retained by the said [*second mortgagee*], and that he shall give such acknowledgment and undertaking with respect thereto as hereinafter contained.

Testatum. NOW THIS

LXIV. Conveyance by Mortgagees and Trustees in Bankruptcy.

INDENTURE WITNESSETH that, in pursuance of the said respective agreements and for effectuating the said sale, and in consideration of the sum of 40,000*l.* this day paid by the said [A. B.] and [C. D.] in equal shares to the persons and in the sums and manner hereinafter mentioned, that is to say, 30,000*l.* part thereof to the said [*first mortgagee*] at the request of the said [*trustee*] (the receipt whereof the said [*first mortgagee*] hereby acknowledges); 3,000*l.* further part thereof to the said [*second mortgagee*] at the request of the said [*trustee*] (the receipt whereof the said [*second mortgagee*] hereby acknowledges; and 7,000*l.* the residue thereof to the said [*trustee*] (the payment and receipt respectively as aforesaid of which said several sums of 30,000*l.*, 3,000*l.*, and 7,000*l.* the said [*trustee*] hereby acknowledges), the said [*first mortgagee*], at the request (*q*) of the said [*trustee*], grants and releases, and, as mortgagee, conveys, and the said [*second mortgagee*], at the request of the said [*trustee*], hereby grants and releases, and, as mortgagee, conveys, and the said [*trustee*] hereby grants and confirms, and, as trustee, conveys unto the said [*purchasers*] and their heirs, ALL THAT the manor or reputed manor of ——, and all that capital messuage or tenement called ——, and all the messuages or tenements, pleasure-grounds, gardens, farms, lands, and other hereditaments situate in the several parishes of X., Y., and Z., in the county of ——, commonly called or known by the name of the —— estate, and containing in the whole —— acres or thereabouts, and more particularly described in the schedule hereto, and delineated on the plan, annexed to these presents and therein coloured pink; To HOLD all the premises, (discharged from all moneys intended to be secured by and from all claims and demands under the hereinbefore recited indentures of the 7th day of April, 1876, and the 2nd day of September, 1878, respectively, but subject, as to the piece of land numbered —— in the said schedule, to an agreement dated the —— day of ——, 18—, and made between the said [*trustee*] of the one part and [*tenant*], of, &c., of the other part, whereby the said piece of land was let by the said [*trustee*] to the said [*tenant*] at the yearly rent of £——,

Conveyance.

Parcels.

Habendum.

Discharged from mortgages, but subject to tenancy and right of sporting.

(*q*) When a conveyance is made by the direction of a trustee, no covenant is implied on the part of such trustee: sect. 7 (2) is confined to the case of a person directing as beneficial owner.

LXIV. Conveyance by Mortgagees and Trustees in Bankruptcy.

determinable as therein mentioned, and as to the shooting-lodge on the piece of land numbered —— in the said schedule, and the cart-stable near thereto, and the sheds and inclosure of pheasantry and the rights of hunting, shooting, and sporting over the whole of the said hereditaments hereby conveyed to the tenancy thereof of Mr. M—— for the season 18— to 18— at the rent of £—— per annum; and also subject to all other tenancies (if any) now subsisting or in any way affecting the said hereditaments hereby conveyed, or any part or parts thereof,) UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns: And the said [*second mortgagee*] hereby acknowledges the right of the said [A. B.] and [C. D.] to production of the said indenture of the 2nd day of September, 1878, and delivery of copies thereof, and hereby undertakes for the safe custody thereof.

Acknowledgment of right to production and undertaking for safe custody.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

LXV. *CONVEYANCE of* MINES, *with grant of* POWERS OF WORKING *subject to* LIABILITY *to make* COMPENSATION *for injury to surface.*

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS [*recite title of vendor*];

Recitals: of agreement for sale of mines.

AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of the mines and hereditaments hereby conveyed and the inheritance thereof in fee simple, together with such powers for the winning and carrying away thereof as are hereinafter contained, for the sum of £——.

Testatum.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby, as beneficial owner, conveys unto the said [*purchaser*], ALL THOSE the mines, veins, and seams of coal and ironstone, and all

Conveyance.

Parcels.

LXV. Conveyance of Mines Apart from Surface.

other mines and minerals whatever, situate and lying in or under the several parcels or closes of land and hereditaments, containing in the whole —— acres or thereabouts, all which parcels or closes of land and hereditaments are more particularly described, with the abuttals and acreage thereof, in the first Schedule hereunder written, TOGETHER with full and free liberty for the said [*purchaser*], his heirs and assigns, and his or their lessees, agents, and workmen, and all other persons by his or their or any of their authority or permission at any time and from time to time, but by outstroke and underground workings only, and without entering upon the surface of the said parcels or closes of land and hereditaments described in the first Schedule hereunder written, or any of them, to search for, get, work, take away, and dispose of the said mines and minerals hereby conveyed, and also any other mines or minerals lying and being within or under any adjoining or neighbouring lands, and to do all things necessary or expedient for the purposes aforesaid or any of them, BUT SUBJECT to the liability of the said [*purchaser*], his heirs and assigns, to make compensation to the said [*vendor*], his heirs and assigns, lessees, and tenants, the owners or occupiers for the time being of the surface of the said parcels or closes of land and hereditaments described in the first Schedule hereunder written for all and any damage or injury to the same surface which shall or may be caused or occasioned by or by reason of the exercise of the liberties, powers, and authorities hereinbefore mentioned, or any of them, TO HOLD the said mines and minerals, and all other the premises hereby conveyed, subject as aforesaid, UNTO AND TO THE USE OF the said [*purchaser*], his heirs and assigns. AND the said [*vendor*] hereby, &c. [*acknowledgment and undertaking as to deeds and muniments of title, ut ante*, p. 381].

Powers to get minerals by underground workings.

Subject to compensation.

Habendum.

Acknowledgments, &c., as to muniments of title.

IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

(*Description of closes of land under which the mines conveyed are situate.*)

THE SECOND SCHEDULE ABOVE REFERRED TO.

(*Muniments of title.*)

LXVI. *CONVEYANCE of land to a purchaser with Exception of the* MINES, *&c., and* RESERVATION *of* POWERS *for the* VENDOR *to* WORK, *&c., the same,* WITHOUT *being liable to make* COMPENSATION *for* DAMAGE *to the surface of the lands sold* (*r*).

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*],

Testatum. of, &c., of the other part, WITNESSETH that, in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*] for the purchase of the lands and hereditaments hereby conveyed free from incumbrances, of which sum of £—— the said [*vendor*] hereby acknowledges the

Conveyance. receipt, the said [*vendor*] hereby, as beneficial owner, conveys unto the said [*purchaser*] and his heirs, ALL those, &c. [*describe parcels*], EXCEPTING out of this conveyance, and always reserving

Exception of mines and minerals, unto the said [*vendor*], his heirs and assigns, all mines, veins, and seams of coal, cannel, and ironstone, and all other mines and minerals lying and being within or under the said lands and

and liberty for vendor to work the same, hereditaments hereby conveyed, TOGETHER with full and free liberty for the said [*vendor*], his heirs and assigns, and his and their lessees, agents, and workmen, and all other persons by his or their authority or permission, whether already given or hereafter to be given at any time and from time to time, but by underground workings only, and without entering upon the surface of the said lands and hereditaments hereby conveyed, or any of them, to search for, get, work, take away, and dispose of the said excepted premises, and also all or any other mines or minerals lying and being within or under any adjoining and neighbouring lands, and with or without leaving any support to the surface of the said lands and hereditaments hereby conveyed, and whether such surface shall or shall not, by any subsidence thereof or otherwise, be depressed, lowered, damaged, or destroyed, and to make, maintain, and use any watercourses, ways, and other works under any part of the said lands and hereditaments hereby conveyed as he the said [*vendor*], his heirs or assigns, or other the

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(*r*) As to exceptions of mines and minerals out of a conveyance and reservations of powers of working, &c., see *ante*, p. 177 *et seq.* The working clauses in this Precedent are exceptionally stringent in favour of the vendor.

persons availing themselves of these present powers shall think proper; He the said [*vendor*], his heirs and assigns, and such other persons as aforesaid not being in any manner liable or responsible for any depression, subsidence, damage, or injury whatsoever which shall or may be caused or occasioned to the surface of the said lands and hereditaments hereby conveyed, or any part thereof, or to any erection, building, engine, machinery, matter, or thing now being or hereafter to be in the said lands and hereditaments hereby conveyed by the working or getting and carrying away, or by the having worked or got and carried away whether by the said [*vendor*], his heirs and assigns, or any such other person as aforesaid, of the said excepted premises, or such other mines and minerals as aforesaid, To HOLD all the same premises except as aforesaid and subject to the exercise of all or any of the liberties and powers hereinbefore reserved UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns.

LXVI. **Conveyance of Freeholds with Reservation of Mines.**

without being liable for damage to surface.

Habendum.

LXVII. *CONVEYANCE of* FREEHOLDS *by* TENANT FOR LIFE *under the Settled Land Act*, 1882, *with* EXCEPTION *of* MINES *and* RESERVATION *of* SPECIAL POWERS OF WORKING, *&c.*; COVENANTS *by the* TENANT FOR LIFE NOT *to* CAUSE *unnecessary* DAMAGE, *and for* COMPENSATION *for Injury to the Surface, &c.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*tenant for life*], of, &c., of the first part; [*trustees*], of, &c., of the second part, and [*purchaser*], of, &c., of the third part: WHEREAS under or by virtue of an indenture of settlement, dated, &c., and made, &c. (being the settlement made upon the marriage of the said [*tenant for life*] with —— his wife), the lands and hereditaments hereby conveyed stand limited to the use of the said [*tenant for life*], and his assigns, during his life, without impeachment of waste, with divers remainders over: AND WHEREAS [*recite the appointment of the trustees as trustees of the settlement, ante*, p. 439]: AND WHEREAS the said [*tenant for life*], in exercise of the power in that behalf vested in him by the Settled Land Act, 1882, has agreed with

Parties.

Recitals:

of title of tenant for life;

of appointment of trustees of settlement;

of agreement for purchase;

LXVII. Conveyance by Tenant for Life under Settled Land Act, with Reservation of Mines.

the said [*purchaser*] for the sale to him of the said lands and hereditaments hereby conveyed in fee simple free from incumbrances, subject to the exceptions and reservations hereinafter mentioned, at the price of £——: AND WHEREAS upon the treaty for the said sale it was agreed that, &c. [*recite agreement as to deeds and documents retained by vendor, ante*, p. 380]. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*trustees*] by the said [*purchaser*], by the direction of the said [*tenant for life*], of which sum of £—— the said [*trustees*] and [*tenant for life*] hereby respectively acknowledge the receipt and payment, the said [*tenant for life*], by virtue and in exercise of the powers in that behalf vested in him by the Settled Land Act, 1882, and of every or any other power enabling him in that behalf hereby, as beneficial owner, conveys unto the said [*purchaser*], ALL THOSE [*describe parcels*], all which lands and hereditaments are now particularly described in respect of the boundaries, abuttals, and present tenancies thereof in the first Schedule hereunder written, and are delineated in the map a plan thereof endorsed upon the —— skin of these presents, and are therein edged with a line of blue: EXCEPTING out of this conveyance and always reserving unto the said [*tenant for life*] (*s*) and his assigns, during his life, and to every person who under or by virtue of the said indenture of the —— day of ——, or the limitations thereof, or under or by virtue of any conveyance, lease or other instrument (other than these presents), now is or shall hereafter be or become entitled to the lands and hereditaments comprised in the said indenture of the —— day of ——, all mines, beds, seams, and veins of coal, cannel, ironstone, and other ores of what kind or nature soever, whether opened or unopened, lying and being within and under the said lands and premises hereby conveyed, TOGETHER with full and free power and liberty for the said [*tenant for life*] and such other persons as aforesaid

of agreement for acknowledgment and right of production.

Testatum.

Conveyance.

Parcels.

Reservation

of mines;

of power of working;

(*s*) Where the limitations in the settlement are legal, it seems that the proper mode of reserving mines, &c., is to reserve them as in the text. Where the limitations are equitable, the reservation should be—"to the trustees for the time being of the said indenture of settlement," who, if different from the trustees of the settlement for the purposes of the Act, should be made parties of the third part.

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at all times to enter upon the several closes, parcel of the said lands and hereditaments, as in the said first Schedule are numbered —— and —— and in the said map or plan are edged with a line of red; AND there to dig, bore, delve, sink, search for, get, and work the said mines, beds, seams, and veins of coal cannel, ironstone, and other ores, and for that purpose to sink such and so many pits and shafts, and to drive and make such and so many gates (*t*), headways, staples, soughs, levels, and drains, and to make such ponds and reservoirs and watercourses, and to erect such and so many fire-engines and other machines, and to make use of all such other means as shall be found necessary or convenient for the working, getting, and raising the said mines, beds, seams, and veins of coal, cannel, ironstone, and other ores, and for draining, raising, and discharging the water therefrom according to the best and most improved means usually employed in such or the like cases: AND to deposit upon such part or parts of the said closes as shall from time to time be found necessary or convenient the refuse from any shaft or working, and for that purpose to make pit-banks or spoil banks thereon: AND ALSO to make such and so many railways, tramroads, and other roads and ways, and also such drains and watercourses in, through and over the aforesaid closes, and also in, through and over such parts of the said lands and hereditaments hereby conveyed as are in the said map or plan coloured yellow as shall from time to time be found necessary or convenient, and to do all such other acts and things as shall from time to time be found necessary or convenient for the carrying away the said coal, cannel, ironstone, and other ores, and disposing of the same: AND ALSO from time to time to dig for, get, and raise fire-clay, and other clay, brick earth, loam, and sand, and to make and manufacture the same into bricks, tiles, quarries, and other articles, as well for the use of the said works in or upon the said closes, or any of them, as for the purposes of sale, and to sell and dispose of such bricks, tiles, and quarries, and other articles: AND to burn limestone for the purposes of sale, and to sell and dispose of the same: THE SAID [*tenant for life*] and such other persons as aforesaid making compensation, as hereinafter provided, to the said

to sink shafts;

to make ponds, &c.;

to erect engines and machinery;

to make spoil banks;

to make railways, &c.;

to get clay, &c., and make, use and sell bricks, &c.;

to burn and sell lime;

subject to compensation.

(*t*) For explanation of the terms here used, see *ante*, Vol. III., p. 529, n.

LXVII. **Conveyance by Tenant for Life under Settled Land Act, with Reservation in Mines.**

[*purchaser*], his heirs and assigns, and his or their lessees or tenants for the time being for all damage done to the said lands and hereditaments hereby conveyed by the exercise of any of the rights, liberties, and powers hereinbefore reserved: To HOLD all the same premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, FREED AND DISCHARGED from the limitations, powers, and provisions of the hereinbefore recited indenture of settlement, and from all estates, interests, and charges subsisting or to arise thereunder, BUT SUBJECT to the exceptions and reservations hereinbefore contained: AND the said [*tenant for life*] [*insert acknowledgment of right to production and undertaking for safe custody, ut ante*, p. 381]: AND the said [*tenant for life*] hereby covenants for himself and his assigns with the said [*purchaser*], that he and such other persons as aforesaid will not in the exercise of the liberties, rights, and powers hereby reserved, do any unnecessary or excessive damage or injury to the said lands and hereditaments (including the said closes) or any part thereof, or to any buildings which now are or may hereafter be erected thereon: AND will make due compensation for any damage or injury to the said lands and hereditaments (other than the said closes) as shall be caused by the exercise of any of the liberties, rights, and powers aforesaid, or to any buildings now standing or lying upon the said lands and hereditaments, as shall be determined by arbitration as hereinafter provided: AND will, at his and their own costs and charges, use all necessary and proper means to guard and fence off, with proper fences and gates, all pit shafts, openings, ponds, reservoirs, railways, tramroads, ways, and watercourses, to be made as aforesaid, and will keep such fences and gates in a proper state of repair: AND will fill up all disused pits, shafts, openings, ponds, reservoirs, and watercourses, and within a reasonable time after the whole of the said mines, beds, seams, and veins of coal, cannel, ironstone, and other ores shall have been wholly won, got, and carried away out of the said lands and

Habendum.

Subject to reservations.

Acknowledgment of right to production and undertaking.

Covenants by vendor not to cause unnecessary damage.

To pay compensation (*u*).

To fence shafts, &c.

To fill up shafts and remove spoil banks, &c.

(*u*) Where the forms in the text are employed, it would seem that the vendor is liable to the purchaser for damage and for compensation, and the vendor would, if he should lease the mines, have to be careful to see that the lessee was bound by conditions sufficiently stringent to render him liable to repay to the vendor any such sums so paid to the purchaser.

LXVII. Conveyance by Tenant for Life under Settled Land Act, with Reservation of Mines.

hereditaments, will remove and carry away all pit-banks and spoil-banks, and restore the whole of the surface of the said closes to their present level: And will permit the said [*purchaser*], his heirs and assigns, and his and their lessees, tenants, and licensees at all times to pass and repass across, over, and along any railway, tramroad, or way (but not along the lines thereof), on foot or on horseback, or with horses, cattle, carts, waggons, or other carriages, at his and their convenience respectively, but not so as to interfere with the due exercise by the said [*tenant for life*] and his assigns, and such other persons as aforesaid more than the nature of the case shall reasonably require, and so also that the person or persons so passing or repassing shall do as little damage to the said railways, tramroads, ways, and the fences and gates thereof as the nature of the case will admit of: Provided always, and it is hereby agreed and declared, that if any question, dispute, or difference shall arise concerning the premises or the rights or liabilities of the parties hereto respectively or any persons claiming under these presents hereunder, then such question, dispute, or difference shall be referred to the award and determination and award of two arbitrators, one to be appointed by each of the parties, between whom such question, dispute, or difference shall have arisen, or in case of their disagreement then to the award and determination of an umpire, to be chosen by the said arbitrators before entering upon the reference, and the award of the said arbitrators or of their umpire, as the case may be, shall be final to determine such question, dispute, or difference, and also to determine by whom the costs of the arbitration and award shall be borne. And every such reference shall be deemed to be a submission to an arbitration within the Common Law Procedure Act, 1854, or any statutory enactment for the time being in force with regard to arbitrations. [*Proviso restricting tenant for life's implied covenants for title, if desired, ante*, p. 435.

To allow purchaser to use ways, &c.

Arbitration clause.

In witness, &c.

The First Schedule hereinbefore referred to.

(*Description of parcels.*)

The Second Schedule hereinbefore referred to.

(*Deeds and documents.*)

LXVIII. *GRANT of a* RIGHT OF WAY *through a certain* ROAD *with* HORSES, CARRIAGES, *&c.* (*x*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*grantor*], of, &c., of the one part, and [*grantee*],

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Definition of easement.

(*x*) An easement has been defined as a "privilege that one neighbour hath of another by writing or prescription, without profit, as a way or sink through his land, and such like:" Termes de la Ley, p. 284; and this definition was quoted with approval by *Bayley*, J., in *Hewlins* v. *Shippam*, 5 B. & C. at p. 229. But Mr. Goddard in his valuable Treatise on the Law of Easements, at p. 2, points out the insufficiency of this definition, and suggests the following definition as more complete and accurate, having reference to the present state of the law on this subject:—"An easement is a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the benefit of the former."

Easements are incorporeal hereditaments.

An easement being a privilege is an incorporeal hereditament, and does not confer any estate or interest in the land to which the easement relates. Thus a grant of a right of way over a road does not pass to the grantee the soil of the road: *Clifford* v. *Hoare*, L. R. 9 C. P. 362: and accordingly the grantee cannot prevent the landowner from granting to a third person a similar easement over the same land, nor can he prevent any third person from using the land even in the absence of such new grant, except so far as in either case is necessary for his own enjoyment of his right of way: *R.* v. *Jolliffe*, 2 T. R. 90. A grant of an exclusive right of user of land is not properly a grant of an easement at all: see *Dyer* v. *Lady James Hay*, L. R. 7 Ch. 699. So also the grant of a right to dig coals, &c., in the lands of another does not confer an exclusive right: see *Lord Mountjoy's Case*, 1 And. 302, and *Chetham* v. *Wilkinson*, 4 East, 269: see also sub tit. LEASES, *ante*, Vol. III., p. 492, n., and sub tit. LICENCES, *ante*, Vol. III., p. 619.

Distinction between easements and *profits a prendre*.

An easement merely gives a convenience to be exercised over the grantor's property, and does not give to the grantee any right to appropriate or participate in the profits of the land the subject of the easement: Gale on Easements, 1, 8. And herein an easement differs from a *profit a prendre*, such as a right of fowling or fishing: *Peers* v. *Lucy*, 4 Mod. 355; or a right to enter on land of another for the purpose of cutting trees: *Bailey* v. *Stevens*, 12 C. B. N. S. 91; or of getting stones, gravel, or sand: *Constable* v. *Nicholson*, 14 C. B. N. S. 230; or a right to pasture cattle on the lands of another: *Bailey* v. *Appleyard*, 8 A. & E. 161; but a right of getting water is an easement and not a *profit a prendre*, water not being produce or part of the soil, nor the property of any person until reduced into possession by being inclosed in a tank or vessel: *Rare* v. *Ward*, 4 E. & B. 702. See further, Goddard on Easements, 7, 8.

of, &c., of the other part, WITNESSETH that, in consideration of the sum of £—— now paid to the said [*grantor*] by

LXVIII. Grant of Right of Way.

Testatum.

An easement necessarily implies the existence of two distinct tenements, one the dominant tenement to which the right is attached, and the other the servient tenement which is subject to the obligation: see *Rangeley* v. *Midland Rail. Co.*, L. R. 3 Ch. at p. 310. Strictly speaking, therefore, all easements are appurtenant, and there can be no such thing as an easement in gross. A right of way or any similar right which is not appurtenant to any tenement is only a personal right, and is not capable of assignment: *Ackroyd* v. *Smith*, 10 C. B. 164; *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650. The bearing of the Conveyancing and Law of Property Act, 1881, sect. 62, on this proposition will be considered *infra* in this note.

Existence of distinct dominant and servient tenements essential to easement.

It is essential to the existence of an easement that the dominant and servient tenements should belong to different owners; if the seisin of both tenements in fee simple becomes vested in the same owner, the easement will merge in the dominant tenement, and so be extinguished: *Holmes* v. *Goring*, 2 Bing. 83; *S. C.* 9 Moo. 166; *James* v. *Plant*, 4 A. & E. 749. If the possession of the two tenements for less than the fee becomes united in the same person, the easement will be suspended during continuance of the unity of possession: *Thomas* v. *Thomas*, 2 C. M. & R. 34; *Simper* v. *Foley*, 2 J. & H. 555. On the other hand the intervention of a term in a stranger prevents extinction: *Hinchcliffe* v. *Lord Kinnoul*, 6 Scott, 650. The momentary seisin of a releasee to uses is not sufficient for this purpose: *James* v. *Plant*, 4 A. & E. 749. See also as to lights, *Robins* v. *Barnes*, Hob. 175. The right is not revived by a subsequent grant or devise of the land with which it was formerly enjoyed, distinct from the land over which it extends: *Whalley* v. *Thompson*, 1 Bos. & P. 371; 4 A. & E. 749; *Barlow* v. *Rhodes*, 1 Cr. & M. 439; *Thomas* v. *Thomas*, 2 Cr. M. & R. 34. But where Whiteacre and Blackacre were vested in coparceners, A. and B., and a way was used from Whiteacre over Blackacre, and A. and B. conveyed both estates together, with "all ways therewith usually held, used, occupied, or enjoyed," to the use, as to Whiteacre and the appurtenances, of A. and his heirs; and as to Blackacre, and the appurtenances, of B. and his heirs; it was held, that the right of way over Blackacre passed to B. as an appurtenance to his estate: *James* v. *Plant*, 4 A. & E. 749. It may be here observed, that commissioners of partition may award a right of way over one particular allotment to another: *Lister* v. *Lister*, 3 Y. & C. C. 540; see *Morris* v. *Simmons*, 1 Beav. 411. The doctrine of extinguishment by unity of possession has been considered as confined to cases where the way is one of convenience only, and not of necessity; necessary ways being, it is said, revived by a subsequent grant of the land to which they belong: see *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323 a; *Buckby* v. *Coles*, 5 Taunt. 211; and see *ante*, pp. 186, 188. But this seems not to be an accurate statement of the principle: for if the way be essential to the enjoyment of the land, it passes by the conveyance of the land,

Extinction of easements by unity of seisin.

Distinction in regard to ways of convenience and ways of necessity.

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the said [*grantee*], of which sum of £—— the said [*grantor*] hereby acknowledges the receipt, the said [*grantor*] hereby

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Grant of right of way.

independently of the fact of its prior existence, according to the well-known and long-established rule, that "where the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same:" Co. Lit. 56 a; and therefore, that "where a man having a close which is surrounded by his own land grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant; for without it he cannot derive any benefit from the grant:" *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322 b. See also *Surry* v. *Piggot*, Poph. 172; *Beaudely* v. *Brook*, Cro. Jac. 189; *Packer* v. *Welsted*, 2 Sid. 39; *Staple* v. *Heydon*, 6 Mod. 4; *Chichester* v. *Lethbridge*, Willes, 72; *Howton* v. *Frearson*, 8 T. R. 50; *Osborne* v. *Wise*, 7 Car. & P. 761. So *vice versâ*, *i.e.*, "where he (the grantor) grants the (surrounding) land, and reserves the close to himself:" *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322 b; and see *ante*, p. 181 *et seq.* So a grant or reservation of a right of digging for minerals implies such a right of access to and occupation of the surface as is necessary for obtaining and carrying away the minerals: *Simpson* v. *Selwright*, 2 Lutw. 1247; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197. In the case before suggested, therefore, the way derives its origin from the new grant, and is not revived by it: see *Hinchcliffe* v. *Earl of Kinnoul*, 6 Scott, 650; *James* v. *Dods*, 2 Cr. & M. 266; and see as to implied rights of way, *Senhouse* v. *Christian*, 1 T. R. 560; *Roberts* v. *Karr*, 1 Taun. 495; *Oakley* v. *Adamson*, 1 M. & Sc. 410.

Right of way ceases with the necessity which gave rise to it.

It has been decided that where a right of way which passes as incident to land becomes, from subsequent circumstances, as by the acquisition of other land on the part of the grantee no longer essential to the enjoyment of the land, the right ceases: *Holmes* v. *Goring*, 9 Moo. 166. But the owner of the land cannot destroy the old way by making a new one: *Adeane* v. *Mortlock*, 7 Scott, 189.

Easement imposes no active obligation on owner of servient tenement.

An easement does not impose any active duty on the owner of the servient tenement; his obligation is merely to suffer the user of the land in accordance with the nature of the easement, and to refrain from doing anything which will obstruct or prejudice the enjoyment thereof by the owner of the dominant tenement. Thus, the grant of a right of way over a road is simply that of liberty for the grantee to use that road, and imposes no obligation on the owner of the servient tenement to keep the road in repair; it is for the owner of the dominant tenement to execute such repairs as are necessary for his enjoyment, and he has a right to enter on the land for that purpose: *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322 a; *Chantler* v. *Robinson*, 4 Exch. 163; *Duncan* v. *Louch*, 6 Q. B. at p. 909. But no unnecessary damage to the servient tenement, or inconvenience to the grantor, must be done or caused by the execution of the repairs: *Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 109.

Similarly, easements of air, of light, of watercourse, or of support, all impose on the owner of the servient tenement obligations

grants, and, as beneficial owner, conveys unto the said [*grantee*] and his heirs, Full and free right and liberty for

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of a passive character, *i.e.*, not to pollute or obstruct the free passage of air, or to obstruct the light, or not to dam up, divert, or pollute the stream, or not to remove the things necessary to maintain the support: see Goddard on Easements, 21: see also Gale on Easements, 528. And he therefore incurs no liability if the easement is injured or destroyed by causes not arising from his own acts, at all events, if the causes are natural, though it is said that if the existence of the easement depends on the maintenance of an artificial work, the owner of the servient tenement is bound to keep such work in sufficient repair to secure the enjoyment of the easement: see Gale on Easements, 530; but no decision is there given in support of this proposition. The obligation to maintain the subject of an easement in repair may, of course, be imposed upon the grantor by express covenants contained in the instrument of grant.

Easement is for benefit of dominant tenement.

It may be observed that it is of the essence of an easement that it should exist for the benefit of the dominant tenement alone; so, if the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire the right to have it discharged on his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose: per *Cockburn*, L.J., in *Mason* v. *Shrewsbury and Hereford Rail. Co.*, L. R. 6 Q. B. at p. 587.

No new species of easements can be created.

The above mentioned classes of easements, viz., rights of way, air, light, flow and taking of water (as to which, see *post*, p. 549, note (*z*)), and support are alone recognised as such by law, and no new kind of easement can be created: *Keppel* v. *Bailey*, 2 My. & K. at p. 535; *Hill* v. *Tupper*, 2 H. & C. 121; *Ackroyd* v. *Smith*, 10 C. B. 164: see also Goddard on Easements, 28, 104. Various kinds of other rights or privileges have from time to time been created in favour of the owner of one tenement in or over the tenement of another; such as the right to use the chimney of another to carry off smoke, or to hang clothes out on lines in a yard, to have a notice board or sign post fixed on the house or land of another, &c.: see *Hervey* v. *Smith*, 1 K. & J. 389; *Drewell* v. *Fowler*, 3 B. & Ad. 735; *Hoare* v. *Metropolitan Board of Works*, L. R. 9 Q. B. 206; *Moody* v. *Stiggles*, 12 Ch. D. 261; *Francis* v. *Hayward*, 22 Ch. D. 177. But such *quasi* easements cannot be made appurtenant to the land so as to bind it in the hands of assignees, nor will the grantee be able to sue for infringement of his rights either by the grantor or a third person. An instrument conferring the right, whatever may be its form, will operate merely as a covenant conferring a right on the grantee and imposing an obligation on the grantor which are perfectly valid as between the parties. The proper remedy of the grantee in case of disturbance in his enjoyment of the right is by action on the covenant; and though the burden does not run at law with the *quasi* servient tenement, in equity a person taking such tenement with

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the said [*grantee*], his heirs and assigns, and his and their agents and servants, and the tenants and occupiers for the

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notice of the covenant will be compelled to suffer the enjoyment of the right: per *Mellish*, L.J., in *Leech* v. *Schweder*, L. R. 9 Ch. at p. 475. So also the right of uninterrupted view, or prospect of, or from a house or land is not an easement: *Aldred's Case*, 9 Rep. 58; *Att.-Gen.* v. *Doughty*, 2 Ves. 453; but a covenant not to obstruct a view or prospect will be binding on the parties, though it cannot be annexed to the land: see as to restrictive covenants, *ante*, p. 294, and *post*, Precedents LXXV. and LXXVI.

Creation of easements.

Easements may arise under or by virtue of an express or implied grant, or by devise, or under some statutory enactment, or by prescription, or by custom. In the eye of the law, however, it would seem that all easements are regarded as arising by virtue of an express or implied grant. "Every easement has its origin in a grant, express or implied; the person who can make that grant must be the owner of the land": per *Cairns*, L.J., in *Rangeley* v. *Midland Rail. Co.*, L. R. 3 Ch. at p. 310.

It is proposed here to consider only the creation and transfer of easements arising by express grant.

"Easements may be granted either separately and apart from any conveyance of the dominant tenement, or they may be included in a conveyance of it": Gale on Easements, 84. It has been seen (*ante*, p. 186) that easements will pass in a conveyance of the dominant tenement by the general words and estate clause, which were formerly inserted in conveyances, and are now included and implied in conveyances by the Conveyancing and Law of Property Act, 1881, sects. 63 and 64: see *ante*, pp. 184, 199.

Easements can only be conveyed by deed.

It is clear that a right of way, or any other easement out of land, cannot be created or transferred except by deed: *Fentiman* v. *Smith*, 4 East, 107; *Hewlins* v. *Shippam*, 5 B. & C. 221; *Barlow* v. *Rhodes*, 1 Cr. & M. 439; *Cocker* v. *Cowper*, 1 Cr. M. & R. 418; *Mayfield* v. *Robinson*, 7 Q. B. 486. And a grant by deed will pass an indefeasible right to an easement both as against the grantor and his assigns and as against strangers, whereas a mere license (which may be given without deed) passes no interest, and generally is good only against the grantor and those claiming under him, and may generally be revoked at the grantor's pleasure: see *Wood* v. *Leadbitter*, 13 M. & W. 838; and see also sub tit. LICENSES, *ante*, Vol. III., p. 618. But though no interest of the nature of an easement can be created except by deed, an instrument not under seal purporting to create such an interest may be valid in equity as a contract to grant such interest, and may be enforceable accordingly: *Smart* v. *Jones*, 33 L. J. C. P. 164; *Allen* v. *Seekham*, 11 Ch. D. 790.

Word "grant" not necessary to convey easements.

The Courts have given a liberal construction to instruments purporting to grant easements: *Lord Mountjoy's Case*, 1 And. 307. Easements being incorporeal hereditaments have, from the earliest times, been considered to lie in grant: Co. Lit. 9 a, 42 a; and the word "grant" is the appropriate term whereby to confer the right or privilege. But the use of the word "grant" has never in

time being of the messuage and farm of the said [*grantee*] called [X.] hereinafter mentioned, and all and every other

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modern times been considered essential; it was sufficient if the intention to grant the easement was apparent in the deed: see *Shove* v. *Pincke*, 5 T. R. at p. 129. So in *Holmes* v. *Seller*, 3 Lev. 305, an agreement under seal for the use of a way was held to operate as a grant of a right of way; see also *Northam* v. *Hurley*, 1 E. & B. 665. And now the Conveyancing and Law of Property Act, 1881, sect. 49, expressly enacts that the use of the word "grant" shall not be necessary for conveying hereditaments corporeal or incorporeal, and the section applies to all instruments made either before or after the commencement of the Act.

Reservation of easements.

An easement should not be expressed to be "excepted" out of a conveyance, for it is not a part of the land. It seems more proper, as it is more in accordance with the usual practice, that an easement should be expressed to be "reserved," although, in strictness, easements are not capable of reservation, inasmuch as they do not issue out of the land: see Goddard on Easements, 140; see also Shep. Touchst. 80. An easement over land conveyed may, of course, be effected by means of a re-grant from the purchaser to the vendor, which may either be included in the conveyance of that land, or effected by a separate deed; and where an easement is expressed in a conveyance to be expressed or reserved to the vendor of land, the exception or reservation will apparently be construed and operate as a re-grant: see *Finlinson* v. *Porter*, L. R. 10 Q. B. 188; *Corporation of London* v. *Riggs*, 13 Ch. D. 798. Another mode of conferring an easement on a vendor of land is by conveying the land to the use that the vendor may have the right over the land, and, subject thereto, to the use of the purchaser in fee: see sect. 62 of the Conveyancing and Real Property Act, 1881 (44 & 45 Vict. c. 41). An instrument in this form may be easily framed by the aid of the next following Precedent. In all cases except where there is a separate re-grant of the easement to the vendor, it is advisable that a counterpart should be retained by the vendor. For a form of a reservation of an easement, see *post*, Precedent LXXIV., p. 571.

Grant of easements by way of use.

By the words of the Statute of Uses, every species of real property (except copyhold estates), whether corporeal or incorporeal, in possession, reversion, or remainder, may be conveyed to uses. "The property, however, must be *in esse* at the time of the creation of the uses": Saunders on Uses, 105. Formerly, therefore, easements could not be created by way of uses, for the Statute (27 Hen. 8, c. 10) enables only the creation of *estates* in real property, and of rent-charges, and not the creation of any other interests: see *Beaudeley* v. *Brook*, Cro. Jac. 189. But an easement, when once created, being a hereditament, could be conveyed to uses in the ordinary way. By sect. 62 of the Conveyancing and Law of Property Act, 1881, it is now provided that easements may be created *de novo*, as well as conveyed, when in actual existence, by means of the Statute of Uses.

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persons and person for the benefit and advantage of the said [*grantee*], his heirs and assigns, from time to time and at all

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The section is as follows :—

(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege, in or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him ; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

Effect of the section considered.

The true construction and effect of this enactment do not seem to be altogether free from doubt. There is nothing in the section which expressly, or, as it is conceived, by necessary implication, alters the legal character and essential incidents of an easement (as to which see *supra*), and amongst others the incident that there must be both a dominant tenement and a servient tenement to constitute an easement. The section contains no reference to a dominant tenement, but empowers the owner of freehold land to convey the land to uses whereby an easement, right, liberty, or privilege in, over, or with respect to that land, may be reserved to himself or granted to another: thus the owner may convey the land to a grantee to the use that he the owner may have full and free right, &c., and subject thereto to the use of the grantee in fee simple ; or he may convey the land to a grantee to the use that the grantee or a third person may have full and free right, &c., and subject thereto to the use of the grantor in fee simple. So far no difficulty arises, if it is assumed (according to what would on the whole appear to be the true view of the meaning of the section) that the section applies only to such rights, &c., as are of the nature of easements, and that the grantor, or the grantee, or the third person, as the case may be, must be the owner or occupier of a neighbouring tenement to which the enjoyment is to be attached. But according to this view the enactment under consideration would not seem to be of any great practical value, as it would merely enable a landowner to grant or reserve an easement by virtue of the Statute of Uses, which he could have done with equal simplicity and efficacy independently of that statute. The section under consideration might occasionally prove useful in enabling trustees of a settlement or will in exercise of their express powers to convey an easement directly by way of use to a purchaser or lessee without the necessity for revocation of uses and resettlement (see Clerke & Russell Conv. Acts, p. 183 ; Wolst. and Turn. Settled Land Acts, 31) ; but this advantage is no longer of any great importance, as the exercise of such powers is being to a great extent superseded by means of the statutory powers given to limited owners, of dealing, by way of sale and otherwise, with the settled lands and easements, &c., relating to the same: see the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sects. 3, 6, 17.

Whether the section

But it will be observed that the enactment under consideration

times hereafter at his and their will and pleasure, by night and by day, and for all purposes to go, return, pass, and re-

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mentions not only easements but also rights, liberties, and privileges in, over, or with respect to the land conveyed. A question of some importance arises as to the effect of these words: whether they are merely amplifications of the term easement, signifying rights, &c., *ejusdem generis* with easements; or whether they enable a landowner to create new species of *quasi* easements, and other rights of user over his land by way of use, and to make them, equally with easements, run with the land conveyed. In the absence of judicial decision of the question it is difficult to express a confident opinion which construction is correct. On the one hand the words "right, liberty, or privilege in or over or with respect to land" are, in themselves, of very wide application, and would seem, if taken without reference to the existing law on the subject, to authorise the creation by way of use, and, by the concluding clause of the section, the assignment of rights, &c., not hitherto recognised by law as easements, and the giving to them the incident which has hitherto been recognised only in the case of easements, of running absolutely with the land. The adoption of this construction would have a most serious result in virtually abrogating the law with regard to important rights, &c., relating to land, which are now usually secured by restrictive covenants, and would enable such rights to pass by way of use, binding the servient tenement in the hands of an assignee, even without notice of the obligation. The importance of the change which would, according to this view, be made in the law may be illustrated by supposing a conveyance of land to the use that a grantee should have in perpetuity an uninterrupted view or prospect from his house, and subject thereto to the use of the grantor in fee; the result might be to prevent the land conveyed, or any part thereof, from ever being built upon, and that whether the abstract given to a subsequent purchaser disclosed the obligation or not. On the other hand it must be borne in mind that the scope and object of the Conveyancing and Law of Property Act, 1881, is to render unnecessary the use of many "common forms" of clauses formerly used in conveyances, and to remove formal impediments complicating dealings with property, rather than to confer rights and interests in or over property hitherto unknown to or unrecognised by the law. Moreover the tendency of legislation and judicial decision has long been and is still increasingly against the creation of novel interests in perpetuity, and in favour of removing impediments to and restrictions on the free user and easy transfer of land. On the whole, therefore, it is conceived that the words in question must be taken with reference to the previously existing state of the law with regard to easements, and as merely explanatory of that term. A form of a conveyance under this section will be found *post*, Precedent LXIX., p. 549. But it would seem that if the restricted construction is correct there is no great advantage in adopting such a form. The more extended construction is so far open to question, that a conveyance of land to uses for the

enables the creation of new species of easements.

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pass, with horses, carts, waggons, and other carriages, laden or unladen, and also to drive cattle and other beasts in,

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purpose of creating a right other than an easement, so as to be for ever annexed to the land conveyed, would be of doubtful efficacy. The form of such a conveyance has been indicated in this note, and Precedent LXIX. may be adapted to such a purpose; but it would be prudent that the instrument should contain, in addition to the limitation of uses, restrictive covenants framed in the ordinary form, and so as to bind an assignee with notice, though, as has been seen, *ante*, p. 267, the burden of such covenants will not, apart from notice, run with the land.

Whether the section authorises the creation of easements in gross.

A further question arises as to whether the section under consideration authorises the creation and assignment of easements in gross, contrary to the previous law on the subject. The use of the words "any person" without any qualification is somewhat ambiguous, and construed literally would seem to include a stranger not being the owner of adjacent or neighbouring land, which would become the dominant tenement. But here again the correct view is conceived to be that this section must be interpreted with reference to the existing law, so that the person to whom the easement is given must be the owner of land which will become the dominant tenement, and that the easement will, when created, be assignable by the grantee only together with and as appurtenant to that land.

Suggestions in granting rights of way.

In granting or reserving rights of way the following particulars require attention: First, to describe with distinctness whether it is a foot-way, horse-way, carriage-way, or drift-way, which is intended: a horse-way includes a foot-way, and a carriage-way a horse-way; but it seems that a carriage-way (and *à fortiori* a horse-way) does not necessarily include a drift-way, *i.e.*, a way for driving cattle: see *Bullard* v. *Dyson*, 1 Taun. 283; *Jackson* v. *Stacey*, Holt, N. P. 455; *Cowling* v. *Higginson*, 4 M. & W. 245; *Higham* v. *Rabbett*, 7 Dow. P. C. 653; 5 B. N. C. 623; *Davis* v. *Stevens*, 7 C. & P. 570; *Austin* v. *Scottish Widows' Assurance Soc.*, 8 L. R. Ir. 197, 385. Nor is it always clear whether a horse-way extends to horses laden, or is a bridle-way only: see *Trickey* v. *Yeandall*, 9 Moo. 55. And generally, one right of way does not necessarily include any other of a different kind though inferior: see *Cowling* v. *Higginson*, 4 M. & W. 245; *Henwing* v. *Barnett*, 8 Exch. 187; *United Land Co.* v. *South Eastern Rail. Co.*, L. R. 10 Ch. 586; *Newcomen* v. *Coulson*, 5 Ch. D. 155; *Finch* v. *Great Western Rail. Co.*, 5 Ex. D. 254; and further as to the mode of user of a way: *Howell* v. *King*, 1 Mod. 190; *Senhouse* v. *Christian*, 1 T. R. 560; *Colchester* v. *Roberts*, 4 M. & W. 769. "*Primâ facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted, and the purpose for which it is intended to be used:" per *Jessel*, M.R., in *Cannon* v. *Villars*, 8 Ch. D. 415; see also *Serff* v. *Acton Local Board*, 31 Ch. D. 679. Care should also be taken to mention with precision the course and direction, the commencement and end, of the way, and, when possible, the way should be described by reference to a plan.

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through, along, and over a certain road or way lately formed and fenced off by the said [*grantor*] out of, and from and intersecting certain closes or fields in the parish of —— in the county of —— belonging to the said [*grantor*] in fee simple, which road or way is —— feet in width and —— yards in length, or thereabouts, and leads from the turnpike-road, or public highway, opposite or adjacent to the said messuage and farm of the said [*grantee*] called [X.] in the parish of —— aforesaid, unto and towards a certain road or lane communicating with the farm and lands of the said [*grantee*] called the [Y.] Farm, and which same road or way the right and liberty of user whereof in manner hereinbefore mentioned is hereby granted, and the course and direction thereof are delineated in the map or plan indorsed on these presents, AND also full and free right and liberty for the said [*grantee*], his heirs and assigns, and all or any such persons or person as aforesaid, from time to time and at all times hereafter, with workmen, horses, carts, and other

Power to enter and repair (*y*).

When a way is granted with right of "ingress, egress, and regress," it is a right of way from the commencement to the end of the road, and thence to any other spot to which the grantee may lawfully go: *Somerset* v. *Great Western Rail. Co.*, 46 L. T. 883; cf. per *Kelly*, C.B., in *Sumner* v. *Schofield*, 43 L. T. 763, *dissentiente Huddleston*, B.

An ordinary right of way will not include a right to lay down a railway or tramway along the road: *Neath Canal Co.* v. *Grivarwed Resolven Colliery Co.*, L. R. 10 Ch. 480; see *Dand* v. *Kingscote*, 6 M. & W. 174.

Right to deviate.

The grantee of a right of way is not at liberty, in the case of a temporary obstruction of it by floods or other inevitable accident, to go through another part of the grantor's land during the period of such obstruction; in which respect it has been said that private ways differ from public ways; "because it is for the public good that a passage should be afforded to the subjects at all times, but the same necessity does not exist in the case of a private way:" per Lord *Ellenborough* in *Bullard* v. *Harrison*, 4 M. & S. at p. 393; see also *Taylor* v. *Whitehead*, Doug. 745; and see *ante*, p. 192, n. As regards public ways, however, the right to deviate has been questioned: see the remarks of *Blackburn*, J., in *Arnold* v. *Holbrook*, L. R. 8 Q. B. at pp. 99, 100: and see Goddard on Easements, 373. Obstruction of a road by the grantor of a right of way may justify the grantee in deviating over adjoining ground: *Hawkins* v. *Carbines*, 27 L. J. Ex. 44; *Selby* v. *Nettlefold*, L. R. 9 Ch. 111.

(*y*) This express power does not seem to be strictly necessary (see the preceding note at p. 540), but its insertion is usual, and may be useful as obviating any question as to the grantee's rights.

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persons and things, to enter in and upon the said road or way, the right of user whereof is hereby granted, and to make and lay causeways or otherwise to repair and amend the same road or way as there shall be occasion: And the said [*grantee*] covenants with the said [*grantor*] that he the said [*grantee*], his heirs and assigns, will from time to time and at all times hereafter, at his and their own expense, repair and amend, and keep repaired and amended in a proper, substantial, and workmanlike manner, the said road or way, the right and liberty of user whereof is hereby granted, and also the gate erected by the said [*grantor*] across the same road at the northern end or extremity thereof, and the lock and fastening belonging thereto, and will from time to time, and at all times hereafter, at the like expense of the said [*grantee*], his heirs or assigns, repair and renew the quickset hedge and fence lately planted by the said [*grantor*] on both sides of the said last-mentioned road or way; And also that he the said [*grantee*], his heirs and assigns, and his and their agents and servants, and the tenants and occupiers for the time being of the said messuage and farm called —— using the said road or way, the user whereof is hereby granted, will, if and whenever and so long as the said [*grantor*], his heirs or assigns, the owner or owners for the time being of the said lands adjoining the same road shall so require, immediately after having used and passed through the said gate shut and lock the same.

Covenant by grantee to repair road, &c.

In witness, &c.

LXIX. *GRANT of* FREEHOLDS *to* USES, *whereby the* GRANTEE *acquires a* RIGHT *to use a* SUBTERRANEAN WATERCOURSE *under the Land, and also a* SURFACE STREAM *flowing through the same, and subject thereto to the* USE *of the* GRANTOR *in fee simple* (*z*).

THIS INDENTURE, made the —— day of —— 18—, BETWEEN [*grantor*], of, &c., of the one part, and [*grantee*], of, Parties.

(*z*) A counterpart of this deed should be executed, to be retained by the grantor. Counterpart.

This deed may be easily altered to the ordinary form of a direct grant of the easement, by reference to the immediately preceding Precedent. Grant of flow of water.

Easements relating to water are of four kinds, namely: first, rights relating to the flow of water from or through the servient tenement to the dominant tenement; secondly, rights to discharge water from the dominant tenement on to or through the servient tenement; thirdly, rights to take or use water; and fourthly, rights relating to the pollution of water. These various easements will be here briefly considered. Easements relating to water.

Riparian owners have certain natural rights as regards the flow of water in natural streams as incident to their respective properties, but no such rights exist as regards artificial watercourses; the consideration of these rights, except incidentally, is foreign to the present purpose: see as to their nature and incidents, Goddard on Easements, 71; Gale on Easements, 202. Easements may be created by express grant in either natural or artificial watercourses; they may also be created by implied grant, or prescription, or in other ways by which other easements are created: see *ante*, p. 542, note (*x*). An easement giving to the owner of the dominant tenement a right to the flow of water over the servient tenement, does not impose on the owner of the latter any liability to do anything for the purpose of securing a continuous supply of water, or render him liable in damages for its discontinuance by natural causes: *Mason* v. *Shrewsbury and Hereford Rail. Co.*, L. R. 6 Q. B. at p. 587. But this will not justify him in doing anything whereby or by reason whereof the enjoyment by the owner of the dominant tenement of his easement, or the natural or acquired rights of any third persons, may be prejudicially affected. Thus if a landowner has acquired the right to a flow of water through his land, he may maintain an action against any person diverting it from its usual course, unless such person has himself acquired an easement conferring a right to divert the water: *Mason* v. *Hill*, 3 B. & Ad. 304; *S. C.*, 5 B. & Ad. 1. Rights as to flow of water from or through servient tenement.

The form given in the text purports to confer an easement to divert a stream. It is quite clear that a landowner through whose lands a natural stream flows has a right to have the stream flow in its natural course, and without alteration in flow, quantity, or

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&c., of the other part: WHEREAS the [*grantee*] has recently erected a cotton mill or manufactory on his lands at ——, in

Recitals: erection of mill;

quality: *Embrey* v. *Owen*, 6 Exch. 369; (see also *Gaved* v. *Martyn*, 19 C. B. N. S. 732; *Wood* v. *Waud*, 3 Exch. 748; *Mason* v. *Hill*, 3 B. & Ad. 304; *S. C.*, 5 B. & Ad. 1; *Chasemore* v. *Richards*, 7 H. L. C. 349; *Wilts and Berks Canal Navig. Co.* v. *Swindon Waterworks Co.*, L. R. 7 H. L. 697;) and it is also clear such a landowner may grant to his neighbours easements which will override or modify his rights, such as a right to divert the stream, or to pen up the water higher up the stream so as to lessen the flow of water on to his land, or to erect a weir lower down the stream so as to lessen the fall and cause an overflow of water on to his land: *Wright* v. *Howard*, 1 S. & S. 190; see also *Besley* v. *Shaw*, 6 East, 209. So also it seems clear that an easement may be created of user of water flowing in an artificial channel or watercourse: see *Wood* v. *Waud*, 3 Exch. 748. Great care must be taken, however, in granting and in exercising any easement relating to flow of water not to interfere with the enjoyment by third persons of their rights, whether natural or acquired. Where lands on the opposite sides of a natural stream are the property of different riparian owners, each owner is *primâ facie* the owner of the bed of the stream *usque ad medium filum aquæ;* but neither is entitled to use the bed or banks of the stream, or to grant the right of user thereof to others, in such a manner as to interfere with the natural flow of the water: see *Bickett* v. *Morris*, L. R. 1 Sc. Ap. 47. And though there is no property of the water itself, each owner of the adjacent land has the right to the usufruct of the water flowing through it, and may prevent any infringement of his right: *Embrey* v. *Owen*, 6 Exch. 369; see *Earl of Sandwich* v. *Great Northern Rail. Co.*, 10 Ch. D. 107. But even if the lands on both sides of a natural stream belong to the same person, he is under liabilities to the owners of lands situate higher up and lower down the stream not to obstruct or interfere with the flow of water to their detriment. "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality:" *Gaved* v. *Martyn*, 19 C. B. N. S. 732. As to what is reasonable use of water, see *Miner* v. *Gilmour*, 12 Moo. 156; *Lord Norbury* v. *Kitchin*, 3 F. & F. 292; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 9; *Att.-Gen.* v. *Great Eastern Rail. Co.*, L. R. 6 Ch. 572; *Wilts and Berks Canal Navig. Co.* v. *Swindon Waterworks Co.*, L. R. 9 Ch. 451.

Rights as regards the diversion of water.

Generally speaking no injury will be done to any riparian owner if water diverted from a stream is returned in an unpolluted state to the stream above the boundary of the next lower riparian owner, and in the grant of an easement to divert water this point should be attended to: see *Embrey* v. *Owen*, 6 Ex. 353; *Kensit* v. *Great Eastern Rail. Co.*, 23 Ch. D. 566. But the grantor of an easement of a flow of water along a specified course cannot, nor can any person claiming under him, divert the course of the stream even though there be no loss of water to the grantee by the diversion:

the county of ——: And whereas certain lands of the [*grantor*] are interposed between the land of the said [*grantee*], LXIX. Grant of Watercourse.

Northam v. *Hurley*, 1 E. & B. 665; see *Whitehead* v. *Parks*, 2 H. & N. 870. It has been held that where a right to divert water has been acquired by prescription for the purposes of a mill, that right is limited to the diversion of the quantity ordinarily required for the mill in its state at the time when the right was acquired, and does not entitle the mill owner to an increased quantity of water required by reason of additions to the mill and its machinery: *Besley* v. *Shaw*, 6 East, 209; and the same principle would seem necessary to apply to the case of the grant of such an easement.

Underground watercourses.

As regards underground watercourses, if the channel through which the water is to flow is defined and known, the rights of parties will be the same as in the case of watercourses above ground: see *Wood* v. *Waud*, 3 Exch. 748; *Dickenson* v. *Grand Junction Canal Co.*, 9 Exch. 282; *Chasemore* v. *Edwards*, 7 H. L. C. 349. As to underground percolating streams, see Goddard on Easements, 298; Gale on Easements, 257.

Right to discharge water on land of another.

An easement may also be acquired by grant or otherwise, whereby a person may become entitled to discharge water from his own land on to the land of another. As to liability for discharging water on adjoining lands, see *Whalley* v. *Lancashire and Yorkshire Rail. Co.*, 13 Q. B. D. 131. It is to be observed that on the principle that an easement must be for the benefit of the dominant tenement only (see *ante*, p. 541, note (*x*)), the servient owner cannot require the dominant tenement to continue the discharge of water, however beneficial such discharge may be to the servient tenement: see *Mason* v. *Shrewsbury and Hereford Rail. Co.*, L. R. 6 Q. B. at p. 588.

Right to take water for consumption.

The natural right of riparian owners to a usufruct of water passing through their lands includes the right to take such water for consumption for the benefit of their lands adjacent to the stream, provided that such user is reasonable and also generally that it does not cause material injury to other persons interested in the flow of the water: *vide supra*. And although (as has been already remarked in this note) there can be no property in water until reduced into possession, yet the right to take water for consumption to any reasonable extent from a natural or artificial stream flowing through, or from a ford or well situate upon the lands of another, may be acquired as an easement by grant or otherwise: see *Crossley & Sons* v. *Lightowler*, L. R. 2 Ch. 478. Such an easement may be exercised to any extent or for any purpose specified in the instrument of grant, subject, nevertheless, to the rights of other persons interested. There is also this further limitation to the rights which riparian owners may themselves enjoy or confer on others, as regards consumption of the water of a natural stream, whereby the supply must be to a greater or less extent diminished, namely, that the user must be for the benefit of riparian lands: *Lord Norbury* v. *Kitchin*, 3 F. & F. 292; *Ormerod* v. *Todmorden, &c., Mill Co.*, 11 Q. B. D.

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and a stream or brook, called the ——, flowing through lands of the said [*grantor*] in the parish of ——, in the county of —— aforesaid: And whereas the said [*grantee*] has by the permission of the said [*grantor*] entered upon the said land of

of construction of tunnel;

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155. What are to be regarded as riparian lands is a question of degree which depends on the circumstances of each particular case: see *Embrey* v. *Owen*, 6 Exch. at p. 370. As regards injury to others by diminution of water supply, a distinction has been made between ordinary and extraordinary purposes. A person having a right or easement to take water for consumption may exercise the same for ordinary purposes, such as for domestic use or watering his cattle, without regard to the effect which such use may have upon proprietors lower down the stream; and he is also entitled to use the water for extraordinary purposes, such as irrigation or for manufacturing purposes, subject, however, as a general rule, to the obligation not to inflict upon other proprietors any sensible injury by such use: *Miner* v. *Gilmour*, 12 Moo. 156; see also *Wood* v. *Waud*, 3 Exch. 748; *Embrey* v. *Owen*, 6 Exch. 353; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 603; *Earl of Sandwich* v. *Great Northern Rail. Co.*, 10 Ch. D. 707. But it would seem that user, which at one time or in one place is extraordinary may become ordinary owing to changes of circumstances, and that even the right to consume water for purposes of irrigation or manufacture may, under ordinary circumstances, be shown to be ordinary, and to be exercisable as such, without liability for injury to other proprietors: see *Ormerod* v. *Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155.

Right to pollute watercourses.

The rights of a landowner as regards the purity of water flowing through his lands differ according as the watercourse is natural or artificial. In the case of natural streams, whether flowing along the surface or by underground channels, whether defined or undefined, the rights of the landowner extend not only to quantity but also to the quality of the water-flow: see *Wood* v. *Waud*, 3 Exch. 748; *Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Wright* v. *Williams*, 1 M. & W. 77. There is no such natural right in the case of an artificial stream, and it appears to be doubtful whether a right to purity of water flowing in an artificial stream can be acquired by appropriation and user of the water: see *Wood* v. *Waud*, 3 Exch. 748; *Whaley* v. *Laing*, 3 H. & N. 675; *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163. As to pollution of a well by percolation, see *Ballard* v. *Tomkinson*, 29 Ch. D. 115. But easements adverse to rights to purity of water may be acquired by grant, or in any other way by which easements may be created, which will authorise the grantee or other person entitled to the easement to pollute water without being liable for injury to the servient tenement. Such a right may be acquired by prescription if the pollution of a watercourse has been continually exercised and acquiesced in for a period of twenty years: see the Prescription Act (2 & 3 Will. 4, c. 71), commonly called Lord Tenterden's Act; and most of the numerous decisions as to such easements relate to cases in which they were alleged to have been so acquired: see Goddard on Easements, 308, and the cases there cited.

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the said [*grantor*], and has constructed an underground culvert or tunnel therein for the purpose of conducting water from the said brook to his said mill, and also an open watercourse or channel for conducting the said water from the same mill back into the said brook in manner hereinafter appearing: AND WHEREAS the said [*grantor*] has agreed with the said [*grantee*] to grant to him such easement or right of watercourse through, under, and along such adjoining land of the said [*grantor*] as hereinafter appears for the sum of £——: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the sum of £—— now paid to the said [*grantor*] by the said [*grantee*], of which sum of £—— the said [*grantor*] hereby acknowledges the receipt, the said [*grantor*] hereby, as beneficial owner, conveys to the said [*grantee*], ALL that the close or parcel of land called or known by the name of ——, and containing —— acres or thereabouts, and bounded on the east side thereof by the said stream or brook called the ——, and on the south-west side thereof by the said land of the said [*grantee*], all which close or parcel of land is more particularly delineated in the map or plan thereof drawn upon the margin of these presents, and is therein edged with a line of green: TO HOLD all the premises UNTO the said [*grantee*] and his heirs, to the uses and for the purposes following, that is to say: TO THE USE that the said [*grantee*], his heirs and assigns, may for ever hereafter have and enjoy the full and free right of the flow of water from the point marked A in the said plan on the bank of the said stream or brook called the ——, to the said mill of the said [*grantee*], through the said underground culvert or tunnel, so constructed in the said close or parcel of land as aforesaid (the course of such culvert or tunnel being delineated on the said plan and therein coloured red), and also from the said mill to the point marked B in the said plan on the bank of the said stream or brook, through and along the said open channel or watercourse (the course of such open watercourse or channel being delineated on the said plan, and therein coloured blue), And also the full and free right and liberty henceforth for ever to use the said underground channel or tunnel and open watercourse respectively, and to maintain the same in a proper state of repair and condition respectively: AND to the further USE that the said [*grantee*], his heirs and assigns, shall have full and free

of agreement to grant easement.

Testatum.

Conveyance of servient tenement.

Habendum.

Uses creating easement.

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liberty from time to time to inspect the state and condition of, and uphold, amend, repair, cleanse, and maintain the said underground tunnel and open watercourse respectively, and for the purposes aforesaid or any of them, at all reasonable times with surveyors, workmen, horses, carts, waggons, and other persons and things to enter upon the said close or parcel of land or any part thereof, and to bring and place upon the same such materials, implements, and things as may be necessary, and to open and dig up the surface of the same close or parcel of land: AND SUBJECT to the said easements and rights of the said [*grantee*], TO THE USE of the said [*grantor*], his heirs and assigns, for ever: PROVIDED always that the said [*grantor*], his heirs and assigns, shall not be in any way bound to retain the surface of the said close or parcel of land at its present level, or to refrain from erecting buildings over the said underground culvert or tunnel, except at the part of the course thereof from the point marked A to the point marked C, and from the point marked D to the point marked E on the said plan: PROVIDED ALWAYS, and the said [*grantee*], for himself and his assigns, hereby covenants with the said [*grantor*], that he the said [*grantee*], his heirs and assigns, will at all times hereafter well and sufficiently uphold, amend, cleanse, and maintain the said underground culvert or tunnel and open watercourse respectively, in substantial and proper repair and condition, and will execute all necessary works and operations for those purposes in a workmanlike manner, and so as not to cause a nuisance to the said close or parcel of land, or the owners, tenants, or occupiers for the time being thereof, and will remove and carry away all stones, gravel, clay, sand, soil, and rubbish which shall be from time to time taken out of the said underground culvert or tunnel and open watercourse respectively, and will replace and restore and level the surface of the said close or parcel of land whenever and wherever disturbed by reason of any such works or operations as aforesaid, and will not unnecessarily damage or injure the surface or the crops for the time being thereon, and will at all times before entering upon the said close or parcel of land or any part thereof for the purpose of any such works or operations as aforesaid (except in the case of sudden obstruction of the flow of water or other extraordinary accident) give of his

Proviso that grantor may erect buildings (*zz*).

Covenants by grantee to maintain the watercourses, and for indemnity.

(*zz*) See as to this *Goodhart* v. *Hyett*, 25 Ch. D. 182.

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intention so to do at least —— clear days' notice in writing to the said [*grantor*], his heirs or assigns, and also to the tenant or occupier for the time being of the said close or parcel of land: And will at all times hereafter keep indemnified the said [*grantor*], his heirs and assigns, from and against all damage, injury, or nuisance which may be caused or occasioned by the said underground culvert or tunnel and open watercourse, or either of them, or by any such works or operations as aforesaid, to the said close or parcel of land, or to any buildings for the time being erected and being thereon, and also from and against all actions, proceedings, costs, expenses, claims, and demands for or in respect of any diminution or pollution of the flow of water by or by reason of the diversion thereof through the said underground culvert or tunnel and open watercourse respectively, or by or by reason of any work, operation, act, or default of the said [*grantee*], his heirs or assigns, or otherwise in relation to the premises.

In witness, &c.

LXX. *CONVEYANCE in* Fee *of Land, in Consideration of a perpetual* Rent-charge. *Covenant to build, repair, and insure* (*a*).

THIS INDENTURE (*b*), made the —— day of ——, Between [*vendor*], of, &c., of the one part; [*purchaser*], of, Parties.

(*a*) Where lands are sold in consideration of a rent issuing out of them for the benefit of the vendor, it should always be stipulated by whom the expense of the conveyance is to be borne; for, as the vendor takes an interest under the limitations, it does not follow that the rule which throws this expense upon the purchaser in ordinary cases, would apply to this. A question also frequently arises between the solicitors of the respective parties to a conveyance of this nature, as to which of them is entitled to prepare the deed, it being partly in the nature of a purchase-deed, which it is well known is always prepared by the purchaser's solicitor, and partly of a lease, which is invariably prepared by

As to costs, where lands are sold in consideration of a rent-charge.

(*b*) Note (*b*) next page.

LXX. Conveyance in Fee in Consideration of Fee-Farm Rent.

&c., of the second part: [WHEREAS the said [*vendor*] is seised of the lands and hereditaments hereinafter described and hereby conveyed in fee-simple, free from incumbrances: AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of the hereditaments hereinafter conveyed, in fee-simple, free from incumbrances, in consideration of the yearly rent-charge hereinafter limited, and of the covenants on the part of the said [*purchaser*] hereinafter contained [*recital of agreement as to deeds and documents of title if required, ut ante*, p. 380]. NOW THIS INDENTURE] WITNESSETH, that, in pursuance of the said agreement, and in consideration of the yearly rent-charge of £——, hereinafter limited to the said [*vendor*], and of the covenants on the part of the said [*purchaser*] hereinafter contained, he, the said [*vendor*] hereby grants and, as beneficial owner conveys (*d*), unto the said [*purchaser*], and his heirs ALL THAT, &c., [*parcels*]: TO HOLD all the premises UNTO the said [*purchaser*], and his heirs, TO THE USE that the said [*vendor*], his heirs and assigns, may receive a perpetual yearly rent-charge charged upon, and issuing out of all the premises hereby conveyed, and any part thereof, and to be paid by equal quarterly payments upon the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, the first of

Recitals (*c*): of vendor's seisin; of contract for conveyance.

Testatum.

Conveyance.

Habendum to uses limiting rent-charge, with remainder to purchaser in fee.

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the lessor's solicitor. The object of the rule which assigns to a purchaser the expense of preparing his conveyance, and to his solicitor the task of preparing, must have been that the purchaser may mould his conveyance in his own way; but in the present instance, as the vendor also takes an interest in the property, namely, the rent, the limitation of which he must wish to regulate, the reason applies equally to him. In such cases it seems fair that the expense should be borne by the parties equally, and the business jointly transacted by the solicitors.

Stamp.

(*b*) As to the stamp on a conveyance in consideration of a rent-charge, see sect. 72 of the Stamp Act, 1870, set out *ante*, p. 370. Inasmuch as this deed creates a rent-charge in perpetuity and not for a life or lives, or for a term or estate determinable on a life or lives, it is not within sect. 12 of the stat. 18 & 19 Vict. c. 15, and does not require registration under that Act.

(*c*) These recitals are not strictly necessary, and may be omitted if desired; but see *ante*, p. 142.

(*d*) The vendor's covenants for title will be conditioned, by virtue of the statute, upon the fulfilment by the purchaser of the covenants on the purchaser's part contained in the conveyance, as the property is conveyed expressly subject to the rent-charge and to the performance of the covenants.

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such payments to be made on the —— day of —— next (*e*); And subject and so charged as aforesaid, and also subject to the performance of the covenants and obligations on the part of

(*e*) Here followed, before the Conveyancing and Law of Property Act, 1881, came into force, the powers of distress and entry, which may now be omitted in reliance on the provisions contained in sect. 44 of that Act, which gives certain remedies to the person entitled to an annual sum charged upon land, not being a rent incident to a reversion. By sub-section (2), if the annual sum is in arrear for twenty-one days, the person entitled to receive it may distrain; and by sub-section (3), if the annual sum is in arrear for forty days, he may enter into possession of, and hold the land charged, or any part thereof, and take the annual income thereof, until thereby or otherwise the annual sum with any arrears is paid. Sub-section (4) provides that the person entitled to the annual sum, whether he enters into possession or not, may limit a term in the land charged to a trustee for the purpose of securing payment.

These enactments will be found set out, sub tit. ANNUITIES, *ante*, Vol. I. at pp. 671, 673, and a full discussion of the nature and incidents of rent-charges will be found in that place.

If it is desired to insert express powers of distress and entry, they would be in place here, and might run as follows :—

"AND TO THIS FURTHER USE, that, if and so often as any quarterly payment of the said rent-charge of £——, or any part thereof, shall be unpaid by the space of twenty-one days after any of the days appointed for payment thereof as aforesaid, it shall be lawful for the said [*vendor*], his heirs and assigns, into and upon the premises hereby conveyed, or any part thereof, to enter and distrain for the said rent-charge, and all arrears thereof; and the distress and distresses then and there found to dispose of, according to law, to the intent, that thereby or otherwise the said rent-charge of £——, or so much thereof as shall then remain unpaid, and all costs and expenses whatsoever occasioned by the non-payment thereof, may be fully paid and satisfied: AND TO THE FURTHER USE, that, if and so often as any quarterly payment of the said rent-charge, or any part thereof, shall be unpaid by the space of forty days next after any of the days appointed for the payment thereof as aforesaid, although no formal demand thereof shall have been made, it shall be lawful for the said [*vendor*], his heirs and assigns, into and upon the premises hereby conveyed, or any part thereof in the name of the whole, to enter, and the same to hold, and the rents and profits thereof to receive and take, until he or they shall thereby or otherwise be

Power of distress.

Power of entry.

LXX. Conveyance in Fee in Consideration of Fee-Farm Rent.

the said [*purchaser*] herein contained, and to the intent that the same may be binding upon the heirs and assigns of the said [*purchaser*], To the use of the said [*purchaser*] his heirs and assigns: And the said [*purchaser*] hereby covenants with the said [*vendor*], that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will henceforth pay unto the said [*vendor*], his heirs, or assigns, the said rent-charge of £——, at the times and in manner hereinbefore appointed in that behalf as the same shall become payable, without any deduction (*g*); And also, that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will, within two years from the date of these presents, erect and build, on the premises hereby conveyed, with proper materials, and in a workman-like manner, one good and substantial messuage or dwelling-house, with suitable offices, to be completed and finished within the period aforesaid; in which erection and building the said [*purchaser*], his heirs, executors, administrators, or assigns, will lay out and expend the sum of £—— at the least, and will on the request of the said [*vendor*], his heirs, or assigns, produce to him or them the vouchers or receipts for such expenditure, and at all times hereafter, at his and their own costs, well and sufficiently repair or replace and keep in good condition the said messuage or dwelling-house so to be erected and built, and will at his and their own costs, insure and keep insured the same in some respectable office for insurance against fire to the amount of not less than £——, and will, from time to time, upon request produce to the said [*vendor*],

Covenant by purchaser to pay rent;

and to expend £—— in erecting a messuage.

to insure

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fully paid and satisfied all arrears of the said rent-charge, and also so much of the said rent-charge as shall accrue due during such possession; together with all costs and expenses whatsoever occasioned by reason of the non-payment thereof; and such possession, when taken, to be without impeachment of waste."

If the lands are in lease, a term of years should be limited to a trustee for the vendor, which would carry the rent accruing under the demise, during which the powers of distress and entry would otherwise be inoperative.

(*g*) See *ante*, p. 261 *et seq.*, as to the effect of covenants for the payment of the rent-charge. The vendor is entitled to the covenant to pay, as well as to the charge upon the land: see *Bower* v. *Cooper*, 2 Hare, 208; *Dixon* v. *Gayfere*, 1 De G. & J. 655.

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his heirs, or assigns, the policy of insurance for the time being in force, and the receipt for the last premium that shall have fallen due in respect thereof: PROVIDED ALWAYS, and it is hereby agreed and declared, that in case the said [*purchaser*], his heirs or assigns, shall neglect or fail to perform the covenant hereinbefore expressed, for the erection and building of a messuage or dwelling-house, pursuant to that covenant, on the premises hereby conveyed, and the production of the vouchers or receipts relating to the expenditure hereinbefore covenanted to be made therein, it shall be lawful for the said [*vendor*], his heirs, and assigns, to enter into and upon the premises hereby conveyed, to execute and do all such works, operations, acts, and things as may be necessary for or in relation to the erection and building and maintenance of the said messuage or dwelling-house pursuant to the covenants and stipulations in that behalf hereinbefore contained, and to hold and enjoy the same premises and receive the rents and profits thereof, until all the said covenants and stipulations shall have been fully performed and satisfied, and until the said [*purchaser*], his heirs or assigns, shall have paid to the said [*vendor*], his heirs or assigns, all costs, charges, and expenses properly incurred by him or them in or about any such works, operations, acts, or things as aforesaid, or caused or occasioned by breach of any of the said covenants or stipulations, with interest thereon at the rate of 5 per cent. per annum from the dates at which the same shall respectively have been incurred

Proviso for re-entry, on non-performance of covenant to build (*h*).

(*h*) It may be doubted whether the principle of the decision in the case of the *London and South-Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562 (as to unlimited restrictive covenants, see *ante*, p. 293) would not apply to absolute powers of re-entry for breach of restrictive covenants of this nature, so as to render them void as creating a perpetuity. The power in the text has therefore been limited to such entry as may be necessary to remedy the breach of the covenant, which would bring it within the provisions with regard to relief against forfeiture contained in sect. 14, sub-sects. (1) and (2) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and the power thus limited is, as it is conceived, free from all objection on the ground of its creating a perpetuity.

It must be borne in mind that restrictive covenants for the erection and maintenance of buildings, &c., or the execution or performance of other works or acts, will not be enforced against the assigns of the covenantor even with notice: see *ante*, p. 294.

LXX. Conveyance in Fee in Consideration of Fee-Farm Rent.

until payment thereof, or until such costs, charges, expenses, and interest shall have been fully paid and satisfied out of the said rents and profits (*i*). [*Acknowledgment and undertaking as to deeds and documents of title, if required, ut ante*, p. 381] (*k*).

(*i*) If it be the intention of the parties that the rent-charge shall be redeemable the following provisions may be here added:—

Power for the purchaser to redeem the rent-charge.

"PROVIDED ALWAYS, and it is hereby agreed and declared that in case the said [*purchaser*], his heirs or assigns, shall at any time during the lives and life of the said [*vendor*] and [*purchaser*], and of the survivor of them, or within twenty-one years after the death of such survivor, be desirous of purchasing or redeeming the said rent-charge, and of such his or their intention shall give unto the said [*vendor*], his heirs or assigns, six calendar months' notice in writing, to expire within the last mentioned period, then the said [*vendor*], his heirs or assigns, shall on the expiration of such notice, on receiving all sums of money which shall be due in respect of the said rent-charge up to the day of purchasing the same, accept and take the sum of £—— as the price and in full satisfaction or redemption of the said rent-charge; and on receipt of such sum of £——, and of all such sums of money as aforesaid, shall convey and release the said rent-charge unto the said [*purchaser*], his heirs and assigns, or as he or they shall direct."

The statutory power given by sect. 45 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) for the redemption, by application to the Land Commissioners, of quit rents and other perpetual rent-charges does not apply to rent-charges reserved on sales of land: see sub-sect. 5.

(*k*) A counterpart of this deed is usually executed to be retained by the grantee of the rent.

LXXI. *CONVEYANCE in* FEE *of* LANDS *which are* SUBJECT *to a perpetual* RENTCHARGE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS by an indenture dated, &c., and made between [A. B.], of the one part, and the said [*vendor*], of the other part, the piece of land and hereditaments hereby conveyed were assured unto the said [*vendor*] and his heirs to the use that the said [A. B.], his heirs and assigns, should thenceforth receive a yearly rentcharge of £—— issuing out of the same hereditaments, to be paid by half-yearly payments, on the —— day of ——, and the —— day of —— in every year, and subject thereto to the use of the said [*vendor*], his heirs and assigns; And the indenture now in recital contains a covenant by the said [*vendor*] for payment of the said rentcharge, and also to build a messuage or dwelling-house with the appurtenances thereto, and to repair, maintain, and insure the same as therein is mentioned: AND WHEREAS the said [*vendor*] has since the date of the hereinbefore recited indenture built and erected upon the said piece of land a messuage or dwelling-house with the appurtenances thereto, in performance of and pursuant to the covenant in that behalf contained in the same indenture: AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of the said piece of land and hereditaments hereby conveyed with the said messuage or dwelling-house so erected and made thereon as aforesaid, with the appurtenances subject as is hereinafter mentioned, at the price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby as beneficial owner conveys unto the said [*purchaser*] and his heirs ALL THAT piece or parcel of land, &c. [*describe parcels*], and all that messuage or dwelling-house which has been recently built and erected on the said piece or parcel of land as aforesaid, with the stable, coachhouse, outbuildings, and appurtenances thereto belonging, To HOLD all the premises hereby conveyed, subject to the said rentcharge of £—— reserved by the hereinbefore recited

Parties.

Recitals:

of conveyance to vendor in consideration of rentcharge;

of building covenants;

of erection of dwelling-house;

of agreement for sale subject to rentcharge and covenants.

Testatum.

Conveyance.

Parcels: house and stables, &c.

LXXI. Conveyance in Fee Subject to Rentcharge.

indenture and to the covenants on the part of the said [*vendor*] therein contained, and to all powers and remedies for the recovery and securing payment of the said rentcharge,

Habendum.

UNTO AND TO the use of the said [*purchaser*], his heirs and assigns;

Covenant by purchaser to pay the rentcharge, &c., and for indemnity.

And the said [*purchaser*] hereby covenants with the said [*vendor*] that he the said [*purchaser*], his heirs and assigns, will henceforth pay the said rentcharge of £—— reserved by the hereinbefore recited indenture, and perform and observe all the covenants on the part of the said [*vendor*] and conditions contained in the same indenture, and on the part of the grantee of the hereditaments hereby conveyed to be performed and observed, and will at all times keep indemnified the said [*vendor*], his heirs and assigns, estate and effects, against all actions, proceedings, costs, expenses, damages, claims, and demands whatsoever on account or in respect of such rentcharge, covenants, and conditions.

IN WITNESS, &c.

LXXII. *CONVEYANCE by a* MORTGAGEE *and* MORTGAGOR *of a Perpetual Rentcharge comprised in the* MORTGAGE, *and of* FREEHOLD REVERSIONS *and* RENTS *of Lands subject to Leases also comprised in the* MORTGAGE.

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*mortgagee*] of, &c., of the first part; [*mortgagor*] of, &c., of the second part; and [*purchaser*] of, &c., of the third part:

Recitals: of seisin of mortgagor;

WHEREAS at the date of the indenture next hereinafter recited, the said [*mortgagor*] was seised of or entitled to the several pieces or parcels of land and hereditaments described in the schedule hereunder written, for an estate in fee simple in possession free from incumbrances, but subject as to such of the said hereditaments as are described in the second part of the said schedule to the

LXXII. Conveyance of Rentcharge and Freehold Reversion and Rents of Lands in Lease.

several indentures of lease affecting the same hereditaments respectively therein mentioned, and with the benefit of the said indentures of lease and of the rents thereby reserved, and of the covenants on the part of the respective lessees, and conditions contained in the said indentures of lease respectively: And whereas, by an indenture of mortgage dated, &c., and made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, the pieces or parcels of land and hereditaments described in the said schedule hereto, but as to such of the same hereditaments as are described in the second part of the same schedule subject and with such benefit as aforesaid, were conveyed to the use of the said [*mortgagee*], his heirs and assigns, by way of mortgage, to secure the payment to the said [*mortgagee*], his executors, administrators, and assigns, of the sum of £——, and interest thereon as therein is mentioned: And whereas by an indenture dated, &c., and made between the said [*mortgagee*] of the first part, the said [*mortgagor*] of the second part, and [A. B.] of the third part, the said [*mortgagee*] and [*mortgagor*] conveyed unto the said [A. B.] and his heirs all such of the said pieces or parcels of land and hereditaments as are described in the first part of the said schedule hereto, freed and discharged from all principal monies and interest secured by the hereinbefore recited indenture of mortgage, and all securities for the same, to the use that the said [*mortgagee*], his heirs and assigns, should thenceforth receive a yearly rentcharge of £——, issuing out of the same hereditaments, to be paid by half-yearly payments on the —— day of —— and the —— day of —— in every year, and subject thereto, and to the covenants on the part of the said [A. B.] therein contained, to the use of the said [A. B.], his heirs and assigns; And the indenture now in recital contained covenants on the part of the said [A. B.] for payment of the said rentcharge at the times and in manner aforesaid, and also covenants that he, the said [A. B.], his heirs or assigns, would build on the said pieces or parcels of land hereinafter described, —— messuages or dwelling-houses of the nature and in the manner therein mentioned, and would maintain and repair the same respectively and insure the same in the sum of £—— each, and produce to the said [*mortgagee*], his heirs and assigns, the last receipts for premiums and the policies

of mortgage;

of conveyance in consideration of rentcharge;

LXXII. Conveyance of Rentcharge and Freehold Reversion and Rents of Lands in Lease.

of such insurances respectively as therein mentioned; AND it was by the indenture now in recital declared between the said [*mortgagor*] and [*mortgagee*] that the said rentcharge of £—— thereby limited should be substituted for the said pieces or parcels of land and hereditaments hereinafter described, and thereby conveyed as a security for the payment to the said [*mortgagee*], his executors, administrators, and assigns, of the said principal sum of £—— and interest secured by the hereinbefore recited indenture of mortgage, and should be subject, so far as the different nature of the security would admit, to a like equity of redemption, and to like powers of sale and other powers, remedies, and provisions as are contained in the same indenture of mortgage with respect to the said hereditaments therein comprised (*l*): AND

of erection of houses;

WHEREAS the said [A. B.] has, since the date of the last hereinbefore recited indenture, built on the said several pieces or parcels of land, described in the first part of the said schedule hereto, —— messuages or dwelling-houses as appears by such description, pursuant to the covenants in that behalf contained in the same indenture: AND WHEREAS

of state of mortgage debt;

the said principal sum of £—— secured by the hereinbefore recited indenture is still due and owing to the said [*mortgagee*], but all interest thereon has been paid up to the date of these presents: AND WHEREAS the said [*mortgagor*]

of agreement for sale of rentcharge, &c.

has agreed with the said [*purchaser*] for the sale to him of the said yearly rentcharge of £—— and the benefit of all powers and remedies for securing payment thereof, and of all covenants on the part of the said [A. B.] contained in the hereinbefore recited indenture of the —— day of ——, 18—, and also of the freehold reversion of and in the said pieces or parcels of land and hereditaments described in the second part of the said schedule hereto, expectant on the determination of the several terms therein granted by the said several indentures of lease respectively, and of the benefit of the rents reserved by and of the covenants on the parts of the respective lessees and conditions contained in the

(*l*) This deed would also contain a proviso that, till notice to the contrary by the mortgagee, the receipts of the mortgagor should be sufficient discharges for the payments of the rentcharge, but the recital of this provision is not material to the present purpose.

same indentures of lease respectively for the price of £——: AND WHEREAS it has been agreed that the sum of £——, part of the said purchase-money, shall be paid to the said [*mortgagee*] in discharge and satisfaction of the said principal sum of £—— so owing to him as aforesaid, and that he, the said [*mortgagee*], shall join in these presents for the purpose and in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreements and in consideration of the sum of £——now paid to the said [*mortgagee*] at the request of the said [*mortgagor*], of which sum of £—— the said [*mortgagee*] hereby acknowledges the receipt, and of the further sum of £—— now paid to the said [*mortgagor*] by the said [*purchaser*], of which several sums of £——, and £—— respectively, making together the sum of £——, the said [*mortgagor*] hereby acknowledges the payment in manner aforesaid and receipt respectively, he, the said [*mortgagee*] hereby grants and as mortgagee conveys, and the said [*mortgagor*] hereby confirms and as beneficial owner conveys unto the said [*purchaser*] and his heirs, ALL THAT the said perpetual yearly rentcharge of £——, limited by the hereinbefore recited indenture of the —— day of —— 18—, and issuing out of the several pieces or parcels of land and hereditaments particularly described in the first part of the schedule hereto, and all future payments of the said rentcharge; AND ALSO all those pieces or parcels of land and hereditaments particularly described in the second part of the said schedule, and comprised in and demised by the several indentures of lease mentioned in the same part of the said schedule and therein set opposite to the several pieces or parcels of land and hereditaments to which the same indentures respectively relate, and the several yearly rents also mentioned in the second part of the said schedule, and reserved by the said indentures of lease respectively, and amounting in the aggregate to the sum of £——; AND ALSO the full benefit of all powers and remedies for recovering and securing payment of the said rentcharge and rents respectively; AND of all covenants on the part of the said [A. B.] and of the said several lessees respectively contained in the hereinbefore recited indenture of the —— day of ——, 18—, and in the said several indentures of lease respectively, TO HOLD all the premises hereby conveyed UNTO AND TO THE USE of the said [*purchaser*], his heirs and

LXXII. Conveyance of Rentcharge and Freehold Reversion and Rents of Lands in Lease.

Testatum.

Conveyance of rentcharge,

and rents and reversion of leaseholds,

and benefit of powers, &c.

Habendum.

LXXII. Conveyance of Rentcharge and Freehold Reversion and Rents of Lands in Lease.

assigns, SUBJECT nevertheless as to the premises secondly hereby conveyed to the residue now unexpired of the several terms therein granted by the said indentures of lease respectively.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

LXXIII. *CONVEYANCE in* FEE *by* CO-PARTNERS, *in* CONSIDERATION *of a perpetual* RENTCHARGE, *of* PART *of* LANDS *and* EASEMENTS *held by the Vendors* SUBJECT *to a prior* RENTCHARGE *and* COVENANTS.

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., cotton-spinners and manufacturers, and co-partners (*m*), of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS by an indenture dated the —— day of ——, 1850, and made between [A.B.] of the one part, and [C. D.] of the other part, the hereditaments hereby conveyed, together with other hereditaments, were assured unto the said [C. D.] and his heirs, together with full liberty, &c. [*recite fully from the conveyance all easements, rights, and liberties, exceptions and reservations, affecting the property now sold*], to hold all the premises by the indenture now in recital expressed to be assured, subject as aforesaid, unto the said [C. D.] and his heirs, to uses limiting thereout unto the said [A. B.], his heirs and assigns, a perpetual yearly rentcharge of 100*l.* to be paid by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year, with certain powers for the re-

Recitals: of conveyance of land in consideration of prior rentcharge;

(*m*) As to conveyances of land by partners, see *ante*, p. 408, note (*k*).

LXXIII. Conveyance in Fee, in Consideration of Rentcharge, of Part of Land Subject to Prior Rentcharge.

covery thereof, and subject thereto, to the use of the said [C. D.], his heirs and assigns; AND in the indenture now in recital are contained a covenant by the said [C. D.] for payment of the said rentcharge of 100*l.*, and also covenants, &c. [*set out so far as necessary any covenants affecting the property now sold*]: AND WHEREAS by or by virtue of divers mesne assurances and acts in the law, and ultimately by an indenture dated the —— day of ——, 1870, and made between [E. F.] of the one part, and the said [*vendors*] of the other part, the hereditaments comprised in the hereinbefore-recited indenture of the —— day of ——, 1850, became vested in the said [*vendors*], their heirs and assigns, as tenants in common in equal shares, but subject to the said yearly rentcharge of 100*l.*, and to the covenants on the part of the said [C. D.], and conditions reserved by and contained in the same indenture respectively: AND WHEREAS the said [*vendors*] have agreed with the said [*purchaser*] for the sale to them of the fee simple in possession of the hereditaments hereinafter conveyed (subject as is hereinafter mentioned), in consideration of a clear yearly rentcharge or fee farm rent of 50*l.*, and of the covenants on the part of the said [*purchaser*] hereinafter contained: AND WHEREAS the deeds and documents specified in the schedule hereto are now in the possession of the said [*vendors*], or one of them (*n*), and it was upon the treaty for the said sale agreed that the same should remain in the hands of the said [*grantors*], or one of them, and that the said [*vendors*] should give to the said [*purchaser*] such acknowledgment and undertaking in respect thereof as hereinafter appears: NOW THIS INDENTURE WITNESSETH, that in consideration of the yearly rentcharge hereinafter limited, and of the covenants hereinafter contained, and on the part of the said [*purchaser*], to be paid, performed, and observed, each of them the said [*vendors*], according to his estate and interest in the said hereditaments hereby conveyed, hereby grants, and as beneficial owner conveys, unto the said [*purchaser*] and his heirs, ALL that plot of land situate at ——, in the parish of —— aforesaid, containing in the whole —— superficial square yards or thereabouts, which plot of land is more par-

of mesne assurances, and conveyance to vendors;

of agreement for sale of land;

of agreement with regard to deeds.

Testatum.

Conveyance.

Parcels:

land.

(*n*) See, as to the custody of deeds by tenants in common, *ante*, p. 253.

LXXIII. Conveyance in Fee, in Consideration of Rentcharge, of Part of Land Subject to Prior Rentcharge.

ticularly delineated and described in the plan thereof drawn upon these presents, and is therein coloured green, and is part of the said hereditaments comprised in the hereinbefore-recited indenture of the —— day of ——, 1850, together with such liberties of way, and of taking water from the river ——, and of laying pipes and drains across streets as were granted to the said [*vendors*] by the same indenture (except as in the same indenture of the —— day of ——, 1850, is excepted), so far as such liberties and exceptions apply to or affect the hereditaments hereby conveyed, To HOLD all the premises (except and subject as aforesaid) unto the said [*purchaser*] and his heirs, TO THE USE that the said [*vendors*], their heirs and assigns, shall henceforth receive out of the premises hereby conveyed a clear yearly rentcharge of 50*l.*, to be charged upon all the premises hereby conveyed, and every part thereof, and to be paid by equal half-yearly payments, on the 25th day of March and the 29th day of September in every year, without deduction (except property tax), the first payment thereof to be made on the 29th day of September next; and subject to the said yearly rentcharge of 50*l.*, and to the powers and remedies for recovering and securing the payment thereof, and to the performance and observance of the several covenants on the part of the said [C. D.], and conditions reserved and contained by and in the hereinbefore-recited indenture of the —— day of ——, 1850, respectively, TO THE USE of the said [*purchaser*], his heirs and assigns: AND the said [*purchaser*] hereby covenants with the said [*vendors*], that he the said [*purchaser*], his heirs and assigns, will pay unto the said [*vendor*], his heirs and assigns, the said yearly rentcharge of 50*l.*, on the days and in the manner hereinbefore appointed for payment thereof, without any deduction, except property tax thereon; AND will pay and discharge all parliamentary, parochial, and other taxes, rates, assessments, and other impositions whatsoever (except property tax on the rentcharge hereby limited), which now are, or at any time hereafter shall be laid, taxed, assessed, charged, rated, or imposed upon the premises hereby conveyed, or any erections or buildings to be erected and made thereupon, or upon any part thereof, or

Easements.

Habendum.

Limitation of rentcharge.

Covenants by purchaser: to pay rentcharge (*o*),

and taxes;

(*o*) See note (*g*), *ante*, p. 558.

upon the said [*grantors*], their heirs or assigns, for or in respect thereof, by authority of parliament, or otherwise howsoever; And shall within two years [*covenant to build and to repair, ut ante*, p. 558]; And will not at any time hereafter permit or suffer any person or persons whomsoever to use, exercise, or carry on in or upon the said plot of land hereby conveyed, or upon any part thereof, the trade or business (*p*) of a working tallow-chandler, soap-boiler, manufacturing chemist, distiller, boiler-maker, or slaughterman; And will, when required by the said [*vendors*], their heirs or assigns, make, pave, and flag, and at all times when and where and so often as need or occasion shall require, well and sufficiently repair, uphold, support, amend, maintain and keep in good repair and condition, one half part in width of the aforesaid street of twelve yards wide, so far as the same lies co-extensive with, and immediately adjoins the said plot of land hereby conveyed; And also shall and will contribute and pay unto the said [*vendors*], their heirs and assigns, a fair and proportionate share, in common with the persons who, from time to time, shall be in possession of the remainder of the said hereditaments now or late belonging to the said [A. B.], and comprised in the hereinbefore recited indenture of the —— day of ——, 1850, and in proportion to the respective quantities of such remainder of the same hereditaments and of the said plot of land hereby conveyed, of so much of the expense which may be from time to time incurred in repairing and supporting the bridge across the river ——, as shown on the aforesaid plan, and the battlements thereof, as also the road leading therefrom towards and into the [X.] turnpike road, as may be chargeable on the entirety of the said hereditaments comprised in the hereinbefore recited indenture of the —— day of ——, 1850, and payable by the owners therefore, under or by virtue of the "—— Bridge Act, 1830;" And each of them the said [*vendors*], so as to be liable only in respect of one equal undivided —— share of the said premises hereby conveyed, doth hereby for himself and his assigns covenant with the said [*purchaser*], that they the said [*vendors*], their respective heirs and assigns, will, at all

LXXIII. Conveyance in Fee, in Consideration of Rentcharge, of Part of Land Subject to Prior Rentcharge.

to build, &c.;

not to permit certain trades to be carried on;

to pave street;

to contribute to costs of repairing bridge and approaches.

Covenants by vendors:

to pay chief rent, and perform covenants.

(*p*) See *ante*, p. 291.

LXXIII. Conveyance in Fee, in Consideration of Rentcharge, of Part of Land Subject to Prior Rentcharge.

times, duly pay the said yearly rentcharge of 100*l.*, and also will, at all times, observe and perform all the covenants in the said indenture of the —— day of ——, 1850, contained, and on the part of the grantee therein, his heirs or assigns, to be observed and performed, so far as the same relate to such part of the hereditaments comprised in the same indenture as are not hereby conveyed, and will at all times keep indemnified the said [*purchaser*], his heirs and assigns, and the premises hereby conveyed from and against the payment of such rent and the performance of such covenants, so far as the same relate to such part of the said hereditaments comprised in the same indenture as is not hereby conveyed, and from and against all costs, claims, and demands whatsoever by reason of the non-payment, non-observance, or non-performance thereof respectively; And that whenever the said [*purchaser*], his heirs or assigns or his or their tenants, shall, either by reason of a distress or other proceeding, or to avoid a distress or other proceeding, pay the said yearly rent of 100*l.*, or any part thereof, the said [*grantees*], their heirs and assigns, for reimbursement thereof, and of all costs occasioned by the non-payment thereof, may retain the rent hereby reserved, and may also have the same or the like remedy by distress on such of the hereditaments comprised in the said indenture of the —— day of ——, 1850, as are not hereby conveyed, as landlords have for the recovery of rent in arrear upon common leases, and may also enter into receipt of the rent or rents now or hereafter to be payable to the said [*vendors*] or any of them, or their or any of their heirs or assigns, in respect of such of the said hereditaments comprised in the said indenture of the —— day of ——, 1850, as are not hereby conveyed, or may take any one or more of such remedies, until, thereby or otherwise, the said [*purchaser*], his heirs or assigns, shall be reimbursed all monies and expenses which they may have paid or sustained by reason or on account of the non-payment of the said rent of 100*l.*, or any part thereof; Provided also, and it is hereby agreed and declared that in case they the said [*vendors*], their heirs or assigns, shall, at any time hereafter, make or put out in or upon any building to be erected

Power to purchaser to retain rents and distrain if compelled to pay chief rent (*q*).

Proviso as to lights.

(*q*) As to the insertion of such powers of distress, see *post*, p. 635, note (*o*).

upon the land adjoining the north-westerly side of the said plot of land hereby conveyed, any window or light on the south-easterly side of such building, they shall not acquire any permanent right to the continuance of such window or light, so as to prevent the said [*purchaser*], his heirs or assigns, building up to the full extent of the said plot of land hereby conveyed, or exercising any other rights or privileges to which they would have been entitled if such window or light had never existed (*r*); And they the said [*grantors*] hereby acknowledge the right of the said [*purchaser*] to the production of the documents specified in the schedule hereunder written, and to the delivery of copies thereof, and undertake for the safe custody thereof.

LXXIII. Conveyance in Fee, in Consideration of Rentcharge, of Part of Land Subject to Prior Rentcharge.

Acknowledgment, &c., as to documents.

In witness, &c.

The Schedule above referred to.

LXXIV. *CONVEYANCE of* Freeholds *to a* Purchaser, *who* covenants to erect Buildings only *of a* certain Description, *part to be left* unbuilt *upon: the Property being in Lease with other Property, the* Lessee surrenders *the* Part *now sold, in consideration of the* Rent *being apportioned.* Reservation *of a* Right *of* Way *and the* Use of a Yard *to the Vendor, his Heirs and Assigns, Occupiers of an adjoining Close* (*s*).

THIS INDENTURE (*t*), made the —— day of ——, 18—, Between [*vendor*], of, &c., of the first part; [*lessee*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part; Whereas [*recite the vendor's title*]; And whereas, by an indenture of lease, dated, &c., and made between the said [*vendor*] of the one part, and the said [*lessee*] of the other part, the messuages and hereditaments hereinafter conveyed

Parties.

Recitals: of lease;

(*r*) See, with regard to this covenant, sect. 3 of the Prescription Act (2 & 3 Will. 4, c. 71).

(*s*) As to reservation of easements, see *ante*, p. 543, note.

(*t*) In addition to the *ad valorem* duty on the amount of the purchase-money, this instrument will require a deed stamp of 10*s.*, in respect of the agreement for apportionment of the rent.

Stamp.

LXXIV. Conveyance of Freeholds, Reservation of Right of Way, Covenant not to Build, Surrender by Lessee.

were, with other hereditaments, demised to the said [*lessee*] for the term of fourteen years from the —— day of ——, 18—, at the yearly rent of £——; And whereas the said [*purchaser*] has agreed with the said [*vendor*] for the purchase of the fee simple in possession free from incumbrances of the hereditaments hereinafter conveyed, at the price of £——, and the said [*lessee*] has consented to surrender the same unto the said [*purchaser*] in consideration that the said [*vendor*] agrees to accept an apportioned rent of £—— per annum for and in respect of the residue of the said hereditaments comprised in the said lease, in lieu of the said rent of £——; NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— paid by the said [*purchaser*] to the said [*vendor*], the receipt of which sum of £—— the said [*vendor*] doth hereby acknowledge, the said [*vendor*] hereby grants, and, as beneficial owner, conveys, unto the [*purchaser*] and his heirs, All that, &c. [*parcels*], Which messuages, hereditaments, and premises are delineated in the map or plan hereupon indorsed, and therein coloured red; Reserving nevertheless to and for the said [*vendor*], his heirs and assigns, and his and their tenants, under-tenants, bailiffs, and agents, occupiers for the time being of a certain messuage or tenement and hereditaments now in the occupation of [A. B.] and situate and being on land of the said [*vendor*] adjacent to the premises hereby conveyed and on the —— side thereof (which last-mentioned messuage or tenement and hereditaments are delineated in the said map or plan, and therein coloured blue), and his and their agents, servants, and workmen, and all other persons going to or from the last-mentioned messuage or tenement and hereditaments, or any part thereof, and with or without [*or*, but on foot only and without] horses and [*or*] other animals, and [*or*] waggons, carts, and [*or*] other carriages full, free, absolute, and perpetual right of roadway and passage from the high-road or street in —— aforesaid, across, through, and over the said close or yard, lying on the west side of the said messuage hereby conveyed, and every part thereof, to the said messuage and hereditaments coloured blue in the said map or plan, in whatever state (*u*) the last-mentioned hereditaments may be,

of contract for sale;

that lessor has agreed to surrender the lands now sold on having rents apportioned.

Testatum.

Vendor releases

parcels.

Reservation of right of way.

(*u*) The use of this clause excludes the rule that an easement may not be altered by any alteration in the dominant tenement.

LXXIV. Conveyance of Freeholds, Reservation of Right of Way, Covenant not to Build, Surrender by Lessee.

and to whatever use or purpose the same, or any part thereof, or any erection or building to be made thereon, may be put, and for all or any purposes whatsoever; And also the use of the said close or yard in common with the said [*purchaser*], his heirs and assigns; it being the intent and meaning of the said parties hereto, that the whole of the said close or yard shall henceforth for ever lie open and undivided as the same now is, without any building or impediment to be erected thereon, and that the same shall be used in common by the occupiers of the said several messuages or tenements and hereditaments hereinbefore mentioned respectively: TO HOLD all the premises, subject and reserving as aforesaid, UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns: AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said agreement in this behalf, and in consideration of the said apportionment and of the premises, the said [*lessee*] hereby surrenders, assigns, and as beneficial owner conveys to the said [*purchaser*] and his heirs, ALL AND SINGULAR the hereditaments and premises hereinbefore described and hereby conveyed; to the intent that the residue now unexpired of the said term of fourteen years, and all other the estate, term, and interest of the said [*lessee*] in the same hereditaments and premises, (but not in any other of the said hereditaments so demised as aforesaid, and not intended to be hereby conveyed,) may be merged and extinguished in the reversion of the same hereditaments and premises. AND the said [*lessee*] hereby covenants with the said [*purchaser*] that he has not committed or suffered any act or default by means whereof the premises, or any part thereof, are, is, or may be charged or encumbered in any manner howsoever; And that he the said [*lessee*], and all persons lawfully or equitably claiming under him, will at all times, at the cost of the person or persons requiring the same, do and execute every such act, deed, or assurance for the more effectually surrendering or conveying the premises unto the said [*purchaser*], his heirs or assigns, as he or they shall require. AND the said [*purchaser*], for himself and his assigns, hereby covenants with the said [*vendor*] that, notwithstanding any act or default of or by the said [*purchaser*], his heirs or assigns, or of or by any person or persons claiming or to claim through or in trust for him or them, the right of way and the use of the said yard hereinbefore reserved shall henceforth,

And use of yard.

Habendum.

Further *testatum.*

Lessee surrenders the premises now sold to the purchaser.

Covenant by lessee against incumbrances, and for further assurance.

Purchaser covenants for enjoyment of right of way;

LXXIV. Conveyance of Freeholds. Reservation of Right of Way, Covenant not to Build, Surrender by Lessee.

from and at all times for ever, be used and enjoyed by the several persons, and in manner aforesaid, without any lawful hindrance or disturbance whatsoever; And also that he, the said [*purchaser*], will not, nor shall his heirs or assigns, or any person or persons claiming through or in trust for him or them, build, or erect, or permit to be built or erected, upon the premises hereby conveyed, or any part thereof, any house, building, or erection other than dwelling-houses having not less than three habitable floors or storeys, that is to say, one floor or storey not lower than the level of the surrounding ground, and two storeys above the last-mentioned floor or storey, and properly and completely roofed and covered with slates, tiles, or metal; And will not nor shall at any time hereafter build or erect, or permit to be built or erected, any building whatsoever upon the part of the premises hereby conveyed which upon the said plan is shaded with transverse lines, but will permit such part of the premises hereby conveyed to remain for ever unbuilt upon, and, as far as may be, in its present state, for the mutual benefit of the said [*purchaser*] and the said [*vendor*], and their respective heirs and assigns, the owners and occupiers for the time being of the premises hereby conveyed, and of the land adjoining thereto on the north and north-easterly sides thereof: AND IT IS HEREBY DECLARED and agreed that, in case of any breach of the covenant lastly hereinbefore contained, it shall be lawful for the said [*vendor*], his heirs and assigns, thereupon or at any time thereafter (but before the expiration of twenty-one years from the death of the survivor of the said [*vendor*] and [*purchaser*] (*x*)), in, to, or upon the said hereditaments and premises, or any part thereof in the name of the whole, to re-enter, and the same to re-possess and enjoy, as and for his and their former estate, for his and their own use and benefit. AND IT IS HEREBY ALSO DECLARED and agreed, by and between the said [*lessee*] and [*vendor*], for themselves respectively, and their respective assigns, that notwithstanding anything herein

and not to build houses of less than two storeys, &c.

Power of re-entry on breach of covenant.

Mutual covenants between vendor and lessee, that lease shall be

---

As to unlimited covenant not to build, &c.

(*x*) This restriction is inserted, in order to exclude any objection founded on the rule against perpetuities. The better opinion is that unlimited covenants of this nature are not obnoxious to that rule; but the legality of an *absolute* power of re-entry on breach of covenant, unrestricted in point of time, is more questionable: *vide ante*, p. 559.

contained to the contrary, the said indenture of lease, and every clause, reservation, covenant, and condition therein contained, shall be henceforth valid, and subsisting to all intents and purposes, except so far as relates to the said hereditaments and premises, hereby granted and surrendered respectively, and except also that the said annual rent of £—— by the said indenture of lease reserved shall henceforth during the said term be, and the same is hereby reduced to the annual sum or rent of £——, being the apportioned rent to be henceforth paid in respect of the hereditaments not included in these presents. And the said [*purchaser*] hereby acknowledges the right of the said [*vendor*] and [*lessee*] respectively to production of these presents and to delivery of copies hereof, and he hereby undertakes for safe custody of the same (*y*).

LXXIV. Conveyance of Freeholds, Reservation of Right of Way, Covenant not to Build, Surrender by Lessee.

valid as to property not sold.

In witness, &c.

LXXV. *CONVEYANCE of a* Plot of Land *on an Estate laid out for* Building: Exception *of* Mines *and* Minerals: Restrictive Covenants *as to Mode of* Building, *and as to* User of Land.

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part, WITNESSETH, that in consideration of the sum of £—— paid by the said [*purchaser*] to the said [*vendor*], for the purchase of the unincumbered fee simple of the hereditaments hereby conveyed, the receipt of which sum of £—— the said [*vendor*] hereby acknowledges, and also in consideration of the covenants on the part of the said [*purchaser*] hereinafter contained, the said [*vendor*] hereby grants, and as beneficial owner conveys, unto the said

Parties.

Testatum.

Conveyance.

(*y*) In strictness, this agreement as to apportionment should be by a separate deed. A memorandum of the apportionment should be endorsed on the lease. Although the vendor would no doubt be bound to produce this deed, it seems advisable to insert an express acknowledgment of the right as in the text. A counterpart of this deed (as of all conveyances for building purposes) should be executed by the purchaser, and delivered to the vendor.

Memorandum of apportionment.

Counterpart.

LXXV. Conveyance of Freehold Plot of Land Subject to Building Covenants.

[*purchaser*] and his heirs, ALL THAT the plot or parcel of land forming part of the —— Estate, and bounded on the —— side thereof by, &c. [*describing boundaries*], and containing by admeasurement —— superficial square yards or thereabouts, all which premises are delineated on the part of the plan of the said —— Estate indorsed hereon, and therein numbered ——, and coloured red; TOGETHER with full and free liberty for the said [*purchaser*], his heirs and assigns, and his and their friends, visitors, agents, servants, and workmen, with or without horses, carriages, carts, or waggons, to pass and repass over and along any of the roads upon the said —— Estate, for the purpose of going to or returning from the said plot of land; EXCEPTING out of these presents, and always reserving unto the said [*vendor*], his heirs and assigns, all mines and minerals whatsoever, lying within or under the said plot of land hereby conveyed, with liberty for the said [*vendor*], his heirs and assigns, to dig for, work, get, and carry away the same by underground workings only, without breaking the surface of the plot of land and premises hereby conveyed, he and they leaving sufficient pillars to support the said surface and any buildings to be erected thereon: TO HOLD all the premises hereby conveyed, subject to the exceptions and reservations aforesaid, and also subject to the restrictions and undertaking on the part of the said [*purchaser*], with regard to the mode of building and user of the premises, and subject to the obligation to repair, or contribute to the cost of repairing, the roads and ways adjoining the premises, the performance whereof is intended to be further secured by the covenants on the part of the said [*purchaser*] hereinafter contained, UNTO AND TO THE USE OF the said [*purchaser*], his heirs and assigns: PROVIDED ALWAYS, and the said [*purchaser*] hereby covenants with the said [*vendor*] in manner following, that is to say:—

Parcels.

Right of way.

Exception and reservation of mines, &c., and powers of working.

Habendum.

Covenants by purchaser.

To fence in land.

1. To erect forthwith, and for ever thereafter maintain, a good and sufficient fence or partition of oak or wood, not less than ——, or more than —— feet in height, on the sides of the said plot of land abutting on any road as shown in the said plan, and also on the —— side thereof, so as to separate and effectually fence off the said plot of land as well from the adjoining plots of land in the said —— Estate as from any such road as aforesaid.

To build a

2. To erect and build upon the said plot of land, within

—— calendar months from the date hereof, at his own cost, and under the inspection and to the satisfaction of the architect or surveyor for the time being of the said [*vendor*], in a good, substantial, and workmanlike manner, one messuage or dwelling-house, of the cost of £—— at the least [*add any stipulations as to the materials to be used, or other matters in connection with the building of the dwelling-house, that may be agreed upon*]. dwelling-house.

3. That the fencing to be erected as aforesaid between the said plot of land and any such road as aforesaid, and also the messuage to be erected thereon as aforesaid, shall be designed, erected, and completed in accordance with a uniform plan and elevation approved of by the said [*vendor*]. Fence and house to be in accordance with plan.

4. To keep the front wall of such messuage or dwelling-house aligned and even with the building line marked upon the said plan, and to permit no portion of such messuage or dwelling-house to project beyond the said building line. As to frontage.

5. Not to erect upon the said plot of land any building of any nature, whether temporary or permanent, except such messuage or dwelling-house as aforesaid. Not to build except as aforesaid.

6. To use such messuage or dwelling-house so to be erected upon the said plot of land, as and for a private dwelling-house only, and not for the purpose of any trade, business, or profession, of any kind whatsoever, or any purpose of the nature thereof or having the appearance thereof. To use house as a private dwelling-house only.

7. To repair and maintain or pay the cost of repairing and maintaining one-half of so much of each of the roads or ways which adjoin the said plot of land as is co-extensive with the frontage thereof in such road or way, to the intent that the same may for ever hereafter be properly repaired, pitched, and paved, and kept in a proper state and condition. To repair and maintain roads.

And the said [*vendor*] hereby covenants with the said [*purchaser*] in manner following, that is to say:— Covenants by vendor.

1. That he will, before the —— day of ——, 18—, make and complete in a proper and workmanlike manner the roads and ways shown upon the said plan of the said —— estate, and thereon designated by the names of the —— Drive and the —— Road respectively (which roads are or will be more particularly convenient for the user and enjoyment of the said plot of land) (*z*), and will lay down and finish, in manner afore- To make roads.

(*z*) These words would seem sufficient to establish the right of

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said, gravel paths or sidewalks on both sides of the said roads or ways.

Not to permit trades, &c., to be carried on on other lots.

2. That he will not permit or suffer any trade, manufacture, or business or anything in the nature or having the appearance thereof to be exercised or carried on upon any plot of land on the said —— estate, or permit or suffer anything to be done or performed thereon which may be or grow to be a nuisance to the said [*purchaser*] or his assigns; save and except that the said [*vendor*] may permit a hotel, tavern, or other place for the sale of intoxicating liquors to be erected upon all or any of the plots of land on the said —— estate, numbered ——, ——, and —— upon the plan of the said —— estate, a portion whereof is endorsed upon these presents, but only on some one or more of such last-mentioned plots of land.

Proviso as variation of restrictions as to other lots.

PROVIDED ALWAYS, and it is hereby agreed and declared by and between the parties hereto, that it shall be lawful for the said [*vendor*], notwithstanding anything herein contained to the contrary, in the case of any purchaser of any other plot or plots of land upon the said —— estate, to vary or dispense with any or all of the restrictions and conditions herein contained (with the exception of those relating to the cost of repairing any road or roads on the said —— estate, or the covenant on the part of the said [*vendor*] not to permit any building upon the said —— estate to be used as or for an hotel, tavern, beerhouse, or place for the sale of any intoxicating liquor, except upon the plots herein specified in that behalf), without thereby releasing the said [*purchaser*] from any of the said restrictions and conditions on his part herein contained, or giving to the said [*purchaser*] any right to bring any action against him the said [*vendor*] or any purchaser of any plot of land in respect whereof any of the said restrictions and conditions may have been altered or dispensed with, on the ground of such alteration and dispensation: PROVIDED ALSO, and it is hereby agreed and declared, that [*Proviso for re-entry on breach of purchaser's covenants, ut ante*, p. 559, *or*

Proviso for re-entry.

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the assigns of the purchaser to enforce the vendor's covenant to make the roads: see *ante*, pp. 302, 303. In the text it is assumed that there are other roads upon the estate besides those mentioned.

p. 574, *mutatis mutandis*]; And the said [*vendor*] acknowledges, &c. [*Acknowledgment and undertaking as to title deeds, ante*, p. 381].

LXXV. Conveyance of Freehold Plot of Land Subject to Building Covenants.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

[*Deeds and documents of title.*]

Acknowledgment as to title deeds.

LXXVI. *CONVEYANCE of a* PLOT OF LAND *by a* BUILDING SOCIETY *subject to* RESTRICTIVE COVENANTS, *the Covenants being contained in an* INDEPENDENT DEED *executed by the Purchaser.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN The —— Building Society, Limited, duly registered under the Industrial and Provident Societies Act, 1876, and hereinafter referred to as "the said Society" of the one part, and [*purchaser*] of, &c., of the other part: WHEREAS the said Society being the owner in fee simple of an estate known as the —— Estate, situate at ——, near ——, in the County of ——, has laid out the same for building purposes, and has divided it (exclusive of the projected roads) into —— lots; AND WHEREAS the said Society has agreed with the said [*purchaser*] for the sale to him of the fee simple of the hereditaments hereby conveyed (being lot ——) of the said estate; AND WHEREAS it was one of the conditions of the said sale that the said [*purchaser*] should enter into certain covenants contained in a deed of covenant dated the —— day of ——, 18—, and expressed to be made between the several persons whose names are subscribed and seals affixed thereto in the second schedule thereto of the one part, and the said Society of the other part, and that the said [*purchaser*] should execute the said deed of covenant (which deed has been, or is intended to be executed by any purchaser of any lot or lots of the said —— Estate, to the end and intent that

Parties.

Recitals: of ownership of Society;

of agreement for sale;

of agreement as to deed of covenants.

LXXVI. Conveyance of Freehold Plot of Land for Building Purposes, Subject to Covenants in Separate Deed.

all the purchasers of any lot or lots of the said —— Estate may be mutually bound by and subject to the restrictions, duties, and liabilities therein contained), which the said [*purchaser*] has agreed to do: NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises (*a*), and of the sum of £—— paid to the said Society by the said [*purchaser*], the receipt of which sum of £—— the said Society doth hereby acknowledge, the said Society hereby grant, and as beneficial owner, conveys unto the said [*purchaser*] and his heirs, ALL THAT, &c., [*parcels*]; TOGETHER WITH [*any right of way to which the purchaser may be entitled*]; TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, SUBJECT to the performance and observance of all and every the restrictions, duties, and liabilities imposed upon him by virtue of the said deed of covenant so executed by him as aforesaid.

Testatum.

Conveyance.

Habendum.

Subject to deed of covenant.

IN WITNESS, &c.

LXXVII. *DEED OF COVENANTS between* VENDORS *and* PURCHASERS *of* LOTS *laid out for* BUILDING PURPOSES *(to accompany the last Precedent).*

THIS INDENTURE (*b*), dated the —— day of ——, 18—, and made BETWEEN the several persons whose names are subscribed and seals affixed hereto in the second schedule hereto (and who are hereinafter referred to as "the purchasers," and each, or any, or one of them is referred to as "the purchaser," or as "a purchaser"), of the one part, and the —— Land Society (Limited), duly registered under the Industrial and Provident Societies Act, 1876 (hereinafter

Parties.

(*a*) *I.e.*, the undertaking of the purchaser to execute the deed of covenant.

Stamp.

(*b*) Stamp, 10*s.*

LXXVII. Deed of Building Covenants.

referred to as "the said Society"), of the other part: WHEREAS the said Society, being the owner in fee simple of an estate known as the —— Estate, situate at ——, in the county of ——, delineated in the plan annexed to these presents and marked "A.," and sealed with the common seal of the said Society, and therein coloured in part pink and in part green, has laid out the same for building purposes, and for such purposes has divided the same (exclusive of the projected roads coloured brown on the said plan) into —— lots or thereabouts, which several lots are distinguished on the said plan by consecutive numbers from 1 to ——, both inclusive: AND WHEREAS the said Society offered the said estate for sale by public auction on the —— day of ——, 18—, subject to certain conditions referring to particulars and a plan, of which plan the one already mentioned is a copy, and which particulars and conditions are set out in the first schedule hereunder written: AND WHEREAS a portion of the said estate only was disposed of at the said sale and other portions hereof have since been sold by private contract and the remainder of the said estate is intended hereafter to be sold by public auction or (as the case may be) by private contract, subject to such of the said conditions as were or shall be applicable to such sales thereof, at various dates subsequent to the said first-mentioned sale by public auction, and completed at the respective dates mentioned in the second schedule hereto: AND WHEREAS these presents have been prepared by the said Society as, and are the "deed of covenant" referred to in the said first schedule hereto, and the said several persons whose names are subscribed and seals affixed hereto in the said second schedule hereto, have respectively become the respective purchasers of the several hereditaments comprised in, and forming the respective lots of the same estate set opposite their respective signatures and seals in the same schedule, and the contract for each of such purchases was made subject to the conditions aforesaid, and each of the purchasers has agreed to execute the same: AND WHEREAS the lots and the numbers of the lots as mentioned or referred to in the said first schedule hereto are respectively the same as the lots and corresponding numbers shown in the said plan hereto annexed, and the several hereditaments or lots referred to by numbers in the first column of the said second schedule hereto are respectively the same

Recitals:

of laying out land in building plots;

of sale of part of land by auction;

of intention to sell other parts;

as to execution of deed of covenant by purchasers;

as to identification of lots in schedule and plan.

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Testatum.

Covenants by purchasers with each other, and with vendors,

respective hereditaments or lots as are referred to by the same respective corresponding numbers in the said plan hereto annexed, and respectively contain the respective quantities set out in the same schedule: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the premises, each of them the several persons whose names are subscribed and seals affixed hereto in the said second schedule hereto (otherwise each of the purchasers) [to the intent that, so far as possible, the burden of the covenants contained herein by the covenantor may run with and be incident to the lot or lots, and every part of the lot or lots set opposite to his or her signature and seal in the said second schedule hereto, and may bind the same and every part thereof respectively, and all and every persons or person for the time being owning, or entitled to, or interested in the same or any part thereof respectively (*c*)], but so that the covenantor, his or her heirs, executors, or administrators, may not be personally liable on his or her covenants with respect to any particular lot (except in respect of prior acts, defaults, or breaches), after having parted with the same lot, and every part thereof, and with all his or her interest therein, and while he or she has no interest therein; And so that each of the covenantors also covenants and grants in respect only of and so far only as regards the lot or lots set opposite to his or her name in the second schedule hereto, and every part of such lot or lots, and so far only as the covenants herein contained and the conditions and stipulations set forth in the first schedule hereto are applicable to such lot or lots, or any part thereof, doth hereby covenant and grant with and to the others, and separately with and to every two and more of the others, and separately with and to each one of the others of the purchasers, his or her respective heirs and assigns, owners or owner for the time being of or interested for the time being in the said —— Estate aforesaid, and also separately with and to the said Society, its successors and assigns, owner or

but not so as to impose personal liability after parting with their respective lots,

and limited to their respective lots.

(*c*) The better opinion would seem to be that the burden of these covenants will not run with the land, nor bind the assigns of the purchasers except on the ground of notice. It would therefore seem that the words in brackets would be inoperative, and might as well be omitted.

owners for the time being in the said —— Estate aforesaid, or some part thereof, in manner following, that is to say :—

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1. That the covenantor, his or her heirs or assigns, shall and will at all times hereafter abide by, observe, and perform all and every the conditions and stipulations set forth in the said first schedule hereto as explained (if and where necessary) by the said plan, and by these presents, if and so far as the same conditions and stipulations remain to be observed and performed, and shall not nor will at any time or times hereafter use, occupy, or enjoy, or permit or suffer to be used, occupied, or enjoyed, the hereditaments, or lot or lots, set opposite to the name of the covenantor in the said second schedule hereof, or any part of such hereditaments, lot, or lots, otherwise than in accordance with the same conditions and stipulations, so explained (if and where necessary) as aforesaid.

To observe stipulations in First Schedule.

2. That the expenses by condition No. 17 set forth in the said first schedule hereto (*d*) provided to be recovered from the purchaser of any lot or respective lots, in respect of which such default as therein mentioned as to fencing shall have happened shall be charged upon the same lot or respective lots, and upon every or any such lot or respective lots, and the said Society, its successor or assigns, or the owner or owners for the time being of the adjoining land as mentioned in the said condition shall have powers of distress (*e*) and re-entry upon the same lot or respective lots for securing such expenses and every or any part thereof.

As to remedies in case of default of a purchaser in paying expenses.

3. That the said Society, its successors or assigns, and any local or municipal authority with which it or they may make any such contract as is referred to in condition No. 19 in the said first schedule hereto (*d*), and all or any surveyors, contractors, agents, workmen, and other persons employed by the said Society, its successors or assigns, or by such local or municipal authority, for any of the purposes referred to in the said condition No. 19 in the said first schedule hereto, may at all times enter upon and if necessary break up the surface of all or any part of the said estate or lots or lot for all or any purpose incidental thereto, including the making

Power for vendors, &c., to enter, for purpose of making and maintaining sewers, &c.

(*d*) See *post*, pp. 594 *et seq.*, note (*m*).

(*e*) As to the insertion of powers of distress, see *post*, p. 635, note (*o*).

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of preliminary or tentative surveys, admeasurements, borings, and other works; And further may make, form, lay, and execute, and repair, and keep in repair, on, in, through, and under the said estate, or lot or lots, or any part thereof respectively, all or any sewers, drains, cesspools, wells, reservoirs, tanks, filtering beds, pumping stations, pumping houses, pumping and other engines, gasometers, retorts, ovens, gasworks, roads, and other works whatsoever, which the said Society, its successors or assigns, or such local or municipal authority as aforesaid, or any such contractor shall deem necessary, or expedient for, or with a view to carrying out, or otherwise with respect to all or any of the purposes aforesaid, or any system or systems of drainage, and water supply, and gas supply, or any of them, of, or for the —— Estate aforesaid, or any part thereof; PROVIDED ALWAYS that the said Society, its successors or assigns, or any such local or municipal authority as aforesaid, or any such surveyor, contractor, or agent, workman, or other person as aforesaid, shall not under this clause be authorised to enter upon any lot or any part of any lot for any of the purposes aforesaid (whether primary, incidental, preliminary, or otherwise), until after the expiration of seven clear days after notice in writing by the said Society, its successors or assigns, or the said local or municipal authority, shall have been given to the purchaser of such lot, his heirs or assigns, or published in some public newspaper usually circulated in the Borough of —— stating the intention of the said Society, its successors or assigns, or the said local or municipal authority to enter in pursuance of these presents into, over, upon, or under any lot; AND FURTHER that the said Society, its successors or assigns, shall make, or procure to be made good all damage or injury of whatsoever description done, or occasioned to any lot by all or any preliminary, tentative, or temporary surveys, admeasurements, borings, and works of every description, and restore or procure to be so restored as soon as possible to its original state, at the time of entry thereon for any such preliminary, tentative, or temporary purposes or works, and pay, or procure to be so paid, fair and full compensation for all temporary user, alteration, loss, damage, and inconvenience, such compensation to be agreed upon between the said Society, its successors or assigns, and the owner or respective owners for the time being of the lot or respective lots so entered upon

or used (the compensation to each owner being separately determined between him or her and the said Society, its successors or assigns, unless otherwise agreed at the time) and in case of such compensation as to any lot or lots not being so determined whether by reason of the absence or disability of any owner, or other person, or otherwise howsoever, then such compensation with respect to the same lot or lots shall be determined in the same manner as in the next following article of these presents is provided for determining in default of agreement the price of any land permanently required to be taken or used.

Power for vendors to repurchase lots or parts thereof for purposes of works.

4. That the said Society, its successors or assigns, shall for all or any of the purposes or works aforesaid have power to purchase compulsorily the whole or any part of any of the said lots, and (with, or without purchasing the same, or any other lot or lots, or part of any lot or lots), may purchase any rights or easements which the said Society may require, and think fit to purchase in, over, upon, or under all or any one or more of the said lots, or any part thereof, and shall purchase such parts of all or any lots as it or they shall in fact permanently require, take, or use for the purposes aforesaid, at a price to be determined as follows (that is to say), by agreement between the said Society, its successors or assigns, on the one hand, and the owner or owners, or some of the owners of or persons interested in some part so required, taken, or used, cannot be found or shall be under any disability which shall prevent his, her, or their selling or agreeing to sell or conveying the same part or parts, or otherwise no agreement shall be come to with respect to the same part or parts, then the price shall be determined by the surveyor for the time being of the said Society, its successors or assigns, and the surveyor for the time being of the borough of A——, or some other surveyor to be nominated by him, or in case of difference between them by an umpire to be appointed by them before commencing the valuation or determination of the price; And such price shall include all compensation for severance and for damage done to adjoining land of the same owner, and to any adjoining or neighbouring building, or part of a building belonging to the same owner, and such severance and all such damage shall in fact be taken into consideration in determining the price, and such surveyors or umpire may, if they or he think fit, necessary, or

As to ascertainment of price of land re-purchased, and of compensation for severance, &c.

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convenient, direct any works to be executed by the said Society, its successors or assigns, and all such works as shall be so directed to be executed shall be executed accordingly within such time (if any) as shall be so directed, or if no time is limited then within such short a time as shall be reasonably practicable: PROVIDED ALWAYS that if the surveyor for the time being of the borough of A—— aforesaid shall be in the employment of, or in any manner act for the said Society, its successors or assigns, or for the local or municipal authority which shall be doing or be about to do, or shall have contracted to do all or any of the works aforesaid, which shall for the time being be in progress, or in immediate contemplation, or if such borough surveyor shall otherwise or in any manner have any interest in the said works, or shall refuse, or be otherwise unable to act, then (in the first of such cases) he shall for the purpose of this article be deemed to be and shall act as the surveyor of the said Society, and in all of such cases the surveyor for the time being for the Borough of B—— shall be substituted for him for the purposes of these presents, and this present article shall in such cases accordingly be read and construed as if the words "surveyor for the time being of the Borough of B——" were in the same article hereinbefore substituted for the words "the surveyor for the time being of the Borough of A——" wherever the last-mentioned words occur.

As to payment of the purchase-money of land repurchased.

5. That the purchase-money or price of any lot so required, taken, or used as aforesaid, shall be paid to the person or persons entitled to such lot, or such part of the same lot; but if any such person or persons cannot be found, or shall fail or refuse to make out a good title, or if otherwise a good and sufficient discharge for such purchase-money or price cannot be otherwise given to the said Society, its successors or assigns, then and in any such case such purchase-money or price shall be paid to a separate account with the bankers for the time being of the said Society, its successors or assigns, and be held by the said bankers in trust for the owner, or owners, and persons interested in such lot, or such part of a lot as the case may be; and thereupon, and thenceforth, the lot or lots, or part of a lot, in respect of which such money shall be so paid, shall be held by the owner or owners thereof, or person or persons entitled thereto, in trust for the said Society, its successors and

assigns; and the receipt of the bankers aforesaid shall be a full and sufficient discharge for such purchase-money or price, and the society, person, or persons paying the same, shall not be bound or concerned to see to the application, or be answerable for any loss or misapplication thereof, but such owner or owners, or person or persons interested as aforesaid, shall make a good title before he, she, or they shall be entitled to have such purchase-money or price paid over to him, her, or them, such title to commence with the conveyance to the purchaser from the said Society, and such owner or owners, person or persons interested, shall (if required) execute a proper conveyance to the said Society, its successors or assigns, of such lot or lots, or part of a lot, so taken or used as aforesaid.

Saving as to rights of local authority to purchase under Lands Clauses Acts.

6. That Articles No. 3, 4, and 5 respectively of these presents shall not apply to any schemes of drainage, water supply, or gas supply, or to any works respectively which shall be executed by any local or municipal authority, or other corporation, which independently of these presents would have the necessary authority, statutory or otherwise, to execute the scheme or schemes, and works so executed by it, with power for the purposes thereof to enter upon and take lands compulsorily, under the provisions of the Lands Clauses Consolidation Acts, or otherwise, and which shall in fact execute any such scheme or works under such authority, whether by contract with the said Society, its successors or assigns, or not.

Expenses of sewers, &c., to be charged proportionately on lots.

7. That the expenses of and incident to every or any of such systems, as in condition No. 19 of the said first schedule hereto is mentioned or referred to (*f*), of drainage, water supply, and gas supply respectively, shall be chargeable and be charged upon the —— Estate aforesaid, and every part thereof (other than such parts thereof as shall for the time being be laid out or intended for roads, or projected roads, and other than such parts thereof as shall be required and taken, or used permanently, or shall have been for the time being taken or used permanently for the purposes of such one or other of the said systems of drainage, water supply, or gas supply, except the purpose of laying sewers, drains, or pipes),

(*f*) See *post*, pp. 594 *et seq.*, note (*m*).

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the said Society hereby agreeing to give or make the said charge so far as concerns such parts of the property expressed to be charged as shall from time to time and for the time being belong to the said Society, but so nevertheless that each lot as shown on the plan annexed hereto, (whether already sold, or now still belonging to the said Society), or the part not so taken and used, otherwise than for the purpose of laying sewers, drains, or pipes of each such lot, shall be charged or chargeable only with a proportional part of such expense according to the value of such lot, or part of a lot, such value to be ascertained for the purpose in the same manner as the price of any part taken or used for any of the purposes aforesaid, is, in case no agreement shall be come to as to price with respect to the same part provided in article 4 hereinbefore contained, to be determined as provided in the same article, and the value so ascertained shall be final and conclusive, and the owner or owners, or persons interested, or to become interested in each such lot, or part so charged, shall contribute to such expenses accordingly rateably in proportion to the value of such lot or part of a lot.

Expenses of sewers, &c., if paid by vendors to be repayable on demand.

8. That the said Society, its successors or assigns, may in the first place pay all or any such expenses as in the last preceding article are mentioned or referred to, and made chargeable as aforesaid, and each of the purchasers, his heirs or assigns, will, on demand, pay to the said Society, its successors or assigns, his, her, or their rateable contribution to, or proportionate or apportioned share of such expenses, with corresponding interest thereon at the rate of 5*l.* per cent. per annum from the time or respective times of such expenses, or the respective items thereof having been incurred and paid; And that the said Society, its successors and assigns, shall, in addition, have powers of distress (*g*) and entry, and receipt of rents and profits upon the lot, part of a lot, or land, in respect of which any contribution to, or share of such expenses is payable, for securing the payment of such contribution or share of expenses.

As to what is

9. That the expenses referred to in the two last preceding

(*g*) As to the insertion of these powers of distress, see *post*, p. 635, note (*o*).

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articles shall include all sums paid by the said Society, its successors or assigns, to any local or municipal authority, or to any corporation, contractors, or other person or persons, for making, laying down, and executing all or any of the works and things referred to in the 19th condition of the said first schedule hereto (*h*), and also particularly shall include all the costs, charges, and expenses of and incident to all preliminary and tentative surveys, admeasurements, borings, and works, and of and incident to the forming, laying, making, and executing of all works, whether permanent, temporary, primary, incidental or otherwise, and providing all or any materials and labour therefor, and of and incident to the purchase, taking, using, and restoring, or reinstating of any land, rights, or easements purchased, taken, or used, restored or reinstated, for all or any purposes in these presents referred to, or otherwise in accordance with the provisions hereof, whether such land, rights, or easements, or any of them, or any part thereof, do or do not form part of the —— Estate aforesaid, and all damages which shall be payable and paid by the said Society, its successors or assigns, and all costs, charges, and expenses of and incidental to all or any accommodation works (whether directed under article 4 of these presents, or otherwise executed), and shall include also the purchase-money and compensation paid for all or any such land, rights, or easements as aforesaid, and the costs paid by the said Society, its successors or assigns, in respect thereof, or of purchasing, taking, or using the same, and of the conveyance thereof, and of investigating, making out, shewing, and passing the title thereto of the vendors thereof, and of the persons interested or claiming to be interested therein, and the fees, costs, charges, and expenses of all surveyors, architects, arbitrators, umpires, and other persons, and of and incident to all plans, sections, maps and drawings, made for all or any of the purposes aforesaid, whether ultimately adopted or carried out or not, and shall also include the value of all or any land for the time being belonging to the said Society taken or used for all or any of the purposes aforesaid, and of every or any easement or right, or anything in the nature of, or which, if the land

to be included in the expenses above referred to.

(*h*) See *post*, pp. 594 *et seq.*, note (*m*).

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belonged to some third person, would be an easement or right in, over, upon, or under any land of the said Society, and the costs of restoring the surface of any land, the surface of which shall have been disturbed, and of all accommodation works rendered reasonably necessary or proper by such taking or using, or by all or any such works as in these presents are authorised or referred to, and which accommodation works shall be actually executed, such value to be determined in the same way in all respects as (in case no agreement shall be come to as to the price to be paid by the said Society, its successors or assigns, for any lot, or part of a lot, which has or shall have been purchased as aforesaid by any purchaser, party hereto, and which shall be required, taken, or used for any of the purposes aforesaid) the price is to be determined under article 4 of these presents: PROVIDED that such price shall be determined, and such value shall include all such compensation as may under the last mentioned article be included in such price, with full power for the surveyors or their umpire to direct or authorise the execution of all or any accommodation works, and generally such expenses shall include all such monies as the said Society, its successors or assigns, shall have reasonably expended in, upon, about, or for all or any of the purposes mentioned or referred to in the said 19th condition of the said first schedule hereto (*i*), as explained or expanded in or by these presents, and shall also include all the costs, charges, and expenses of and incident to ascertaining or determining the value of any lot, or part of any lot, for all or any of the purposes aforesaid, or of articles 7 and 8 of these presents, or either of them, and of apportioning the expenses under article 11 hereof, and shall also in cases under article 6, and where articles 3, 4, and 5 respectively shall be excluded, include all costs, charges, and expenses incurred in or about and for the purposes of and with a view to the execution of the scheme or works which shall be executed as in article 6 mentioned or referred to, and which costs, charges, and expenses shall in that case be substituted for the corresponding expenses, which, if the said scheme and works had been executed wholly under the powers

(*i*) See *post*, pp. 594 *et seq.*, note (*m*).

of these presents, would have been within the provisions of this present article, but shall be so substituted for such corresponding expenses only, and shall not exclude any other costs, charges, or expenses, which would have been within the provisions of the present article if such scheme and works had been executed wholly and exclusively under the authority of these presents and of condition 19 in the said first schedule hereto.

As to charge of expenses if roads abandoned.

10. That in case of the projected roads shown on the said plan hereto annexed, or any part of them, or of any of them, shall be abandoned under condition No. 6 in the said first schedule hereto, then and in such case the road or roads, or part or parts thereof so abandoned, shall henceforth be charged with a proportionate part according to its or their value of the expenses referred to in article No. 7; and in case any part or parts now belonging to the said Society of the said —— Estate, and not being a projected road, or portion of any projected road, shall at any time hereafter be appropriated by the said Society for and to be formed into a road or roads, then and in such case such part or parts shall henceforth cease to be charged or chargeable with any part of such expenses as aforesaid, the amount with which each part or parts were previously or would be otherwise chargeable or charged being thrown rateably upon all the other parts (not being for the time being such roads or projected roads as aforesaid, or parts permanently required, taken, or used for the said works other than the laying of sewers, drains, or pipes) of the same estate.

As to mode of apportionment of expenses.

11. That after the value of each lot, or part of a lot, made or intended to be made chargeable with a share of expenses under articles 7 and 8 hereof respectively, or either of them, shall have been determined as aforesaid, the secretary for the time being of the said Society may from time to time, as occasion shall require, apportion all or any such expenses on each lot or part respectively, and where several lots, or parts of lots, shall belong to the same owner or owners, may combine all or any of such several lots, or parts of lots, without a separate apportionment for each lot, and every apportionment so made by the said secretary shall be accepted as sufficient and correct, unless and until some manifest error be shown or discovered therein within one calendar month from the date of the delivery thereof.

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Power of distress for unpaid expenses (*k*).

12. That the said Society, person, or persons to whom any powers of distress and entry are given or covenanted to be given by these presents for securing any expenses referred to in article 2 of these presents, or for securing any contribution pursuant to article 8 of these presents, and the successors, heirs, or assigns of such society, person, or persons, if the first-mentioned expenses, or any part thereof, or (as the case may be) any such contribution as last aforesaid, or any part thereof, or any interest in respect thereof, shall remain unpaid for ten days after demand thereof, and whether the demand be a strictly legal demand or not, may enter and distrain upon the premises thereby charged or hereinbefore expressed to be charged with such expenses or contribution (as the case may be) as aforesaid, or upon any part thereof as for rent in arrear, and dispose according to law of the distress or distresses there found, to the intent that such expenses or contribution (as the case may be), and (in the case of distress for contribution) all interest on, or in respect of such contribution, and in any case all costs and expenses incurred by the non-payment of such expenses, or (as the case may be) contribution of interest thereon, may be fully paid and satisfied:

Power of re-entry.

And further, if any part of the expenses, or (as the case may be) contribution or interest thereon, shall remain unpaid for forty days after demand thereof, whether the demand were a strictly legal demand or not, may enter upon and hold the premises hereby charged, or hereinbefore expressed to be charged with such expenses, or (as the case may be) such contribution or interest as aforesaid, or upon any part thereof, and take the rents and profits thereof until such expenses or contribution and interest (as the case may be) and all arrears thereof, and all costs and expenses occasioned by the non-payment thereof, shall be fully paid and satisfied; And such possession when taken shall be without impeachment for waste.

Proviso as to rule against perpetuities (*l*).

13. Provided always, and it is hereby declared that any power of distress or entry given, or expressed or intended to

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(*k*) As to the insertion of such powers of distress, see *post*, p. 635, note (*o*).

(*l*) This proviso is inserted in order to prevent the powers referred to from being obnoxious to the rule against perpetuities: see *London and South-Western Rail. Co.* v. *Gomm*, 30 Ch. D. 562, *ante*, p. 293.

be given by these presents, and any power by these presents reserved or given, or intended or expressed to be reserved or given to the said Society, its successors or assigns, or to any authority, or any other person, of entering upon, taking, requiring, using, or purchasing any land, right, or easement, shall respectively not be exercised, or exerciseable, except during the life or lives of some one or more of the purchasers who shall have been alive on the day of the date hereof, or within 21 years next after the death of the survivor of all such persons: PROVIDED ALSO, and it is hereby mutually agreed and declared, that the said powers of distress and entry, or the cesser thereof, shall not prejudice or affect any other remedy which the said Society, its successors or assigns, or any other person or persons, may have or be entitled to for recovering the expenses, contribution, interest, or monies intended or expressed to be secured by such powers of distress and entry, or any part of such expenses, contribution, interest, or monies.

Proviso saving other remedies of vendors.

14. That it is hereby mutually agreed and declared, that in the said first schedule hereto (unless and except such interpretation is inconsistent with the context) the words "the vendors" mean "the said Society," and "the sale plan," or the "sale plan annexed to the particulars," mean or refer to the same plan as the said plan which is annexed to these presents; and the words "the property," or "the property offered for sale," mean the said "—— Estate," or, as the context may require, the same estate exclusive of the projected roads shown on the said plan; the word "purchaser" means or includes "the person whose name is subscribed and seal affixed to these presents in the second schedule hereto;" and the words "any lot sold at the present sale" mean or include any lot in the first column of the said second schedule hereto, opposite to which the name of a purchaser is subscribed in the fourth column of the same schedule.

Interpretation clause.

15. That the said society hereby acknowledges the right of the purchasers to production of the title-deeds relating to the said "—— Estate," and to delivery of copies thereof.

Acknowledgment as to deeds.

16. That in case any dispute or difference shall arise between the purchasers (parties hereto), or between any of them, or their respective heirs, executors, administrators, or assigns, on the one hand, and the said Society, its successors or assigns, on the other hand, touching these presents, or

Arbitration clause.

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anything herein contained, or the construction or operation hereof, or the rights, duties, or liabilities of any party in connection with the premises, then in every such case (except in cases otherwise expressly provided for in or by these presents, or in the conditions in the first schedule hereto, and except where, by reason of any disability on the part of one of the parties to such dispute or difference, an arbitrator cannot be appointed by him or her, or by any person on his or her behalf, other than the other party to the dispute or difference), the matter in dispute or difference shall be referred to two arbitrators, or their umpire, pursuant to, and so as with regard to the mode and consequences of the reference, and in all other respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof; And upon every such reference the arbitrators and umpire shall respectively have power to examine the parties and witnesses upon oath or affirmation, and to enlarge the time for making an award, and either to fix the amount of the costs of the reference and award respectively, or incidental thereto, to be paid by either party, or to direct the same to be taxed, either as between solicitor and client, or otherwise, and to award when and by whom such costs shall be paid; And any such reference may be made a rule of court in any division of Her Majesty's High Court of Justice on the application of any party, and such party may instruct counsel to consent thereto for the other party or parties.

In witness whereof the said purchasers have hereunto set their hands and seals respectively in the second schedule, and in the fourth column thereof, opposite to the lots purchased by them respectively, on the days set opposite to their respective names in the same schedule.

The First Schedule above referred to.

[*Particulars and Conditions of sale* (*m*).]

The Second Schedule above referred to.

[*Enumeration of lots sold, and of the respective purchasers.*]

(*m*) The above precedent is adopted, with slight alterations, from a deed of covenant recently employed on the occasion of the

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sale of a large building estate. The conditions of sale, which are set forth in the first schedule to the deed, were of a somewhat special nature; the conditions more particularly referred to in the deed were as follows:—

CONDITIONS OF SALE.

As to making and maintaining fences.

17. Every purchaser shall, within twelve months after being let into possession of any lot purchased by him, and to the satisfaction of the vendor's surveyor for the time being, make, and afterwards maintain, a sufficient boundary fence or fences to the same lot as mentioned in the "Schedule of Fencing" annexed to the particulars, such fences to be not less than four feet six inches or more than six feet in height. In case any such fence shall not be duly made and maintained, the vendors or the owner or owners of the land adjoining on that side of the lot in respect of which such default shall have happened, may enter upon such lot and make and repair such fence or fences, and recover the expenses thereby incurred from the purchaser of such lot. In case of dispute as to fencing, or as to the sufficiency thereof, such dispute shall be settled by the surveyor for the time being of the vendors, at the joint expense of the parties in dispute, and the decision of such surveyor shall be decisive.

As to character of houses to be erected on lots.

No house shall be erected on any lot which shall be of a less value than the sum specified for such lot in the "Schedule of Building Outlay" annexed to the particulars of sale. The value of a house shall be taken at its first cost in materials and labour, after deducting all trade and other discounts and allowances. Every house to be erected upon any lot sold at the present sale (other than and except lots numbered ——, ——, and ——, upon which or upon any of which an hotel may be erected and carried on with the previous consent in writing of the vendors, and also except lots —— to ——, both inclusive, and lots —— to ——, both inclusive, upon which may be carried on shops for the sale, but not for the manufacture, of articles of household use or ornament, other than intoxicating liquor) shall be used or occupied as a private dwelling-house only, and no other erection shall be built upon any such lot except outbuildings or offices to such dwelling-houses.

As to frontage line.

No dwelling-house or any other erection, or any part thereof, on any such lot shall be built nearer to the site of any projected or intended road shown on the sale plan or the boundary of any adjoining or abutting lot than the building or frontage line shown on the said plan.

As to execution by purchasers of deed of covenant.

Every purchaser shall, at the time of completing his purchase, execute a deed of covenant to be prepared by the vendors, containing all such mutual covenants and restrictions as may be necessary to give effect to the rights, duties, and liabilities given to or imposed upon purchasers under the particulars and these conditions, and to define the mode of enjoyment and the observance of the relative rights and duties of the respective purchasers and their heirs and assigns; but the covenants in such deed shall be framed so as to be personally binding on a purchaser only during the time of his sole or joint ownership or interest, and, so far as practicable, to

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run with the land to which the covenants relate. The vendors are not to be considered for the purposes of this condition as standing in the place of purchasers of or as persons entitled to lots unsold at this sale. Every conveyance to a purchaser shall contain a reference to the deed of covenant; and upon the completion of each conveyance, the purchaser shall pay to the vendor's solicitor a fee of one guinea in respect of the said deed of covenant, and shall thereupon be entitled to receive an attested copy thereof.

As to conveyances of lots.

As to making and maintaining roads.

18. Every purchaser shall, within two years after the completion of his purchase, at his own expense, with proper materials and in a workmanlike manner, and to the satisfaction of the surveyor of the vendors, make and form into a road fit for carts, waggons, and carriages, and at the levels shown on the estate plans deposited with and passed by the Urban Sanitary Authority, such part or parts of the land retained by the vendors, in front of or adjoining the lot or lots purchased by him, as is or are in the sale plan delineated by being coloured pink, as part or parts of a projected road or roads, up to the centre of such road or roads, and shall so make the same as to form a continuous road with the road made or proposed to be made on the adjoining part or parts retained by the vendors as proposed roads, and shall at all times until the same shall be adopted as a public highway, at his own expense, repair and maintain the same with proper materials and in good condition, so as to be fit for use as aforesaid; and shall and will, as and when legally called upon to do so, at his own expense, comply with the requirements of the local authority as to paving and sewering the said road. And every person passing from or to any of the lots, or any part thereof respectively, shall, at all times after the day of sale, have the right, with or without carts, waggons, horses, or other animals, to pass and repass over the whole of the projected roads, or over such parts thereof as shall not for the time being have been abandoned as roads, or intended roads under these conditions, and over all or any substituted roadways for the time being proposed by the vendors, or the sites thereof respectively, and the several conveyances shall be made subject to the rights and liabilities created by or implied in this condition. But no purchaser shall require the production of, or investigate, or make any objection or requisition in respect of the title of any proposed road; and the vendors shall not be bound to enforce any such liabilities or rights as in this or in any other previous condition mentioned, further or otherwise than by making every conveyance subject to the rights and liabilities as to the use and making of roads mentioned in this condition, and requiring every purchaser at this sale to execute the deed of schedule aforesaid. If any of the lots be not sold at this sale the vendors shall not, for the purpose of this condition, stand in the place of a purchaser of such lot or lots, so as to be bound to make or maintain the whole or any part of any such projected road as aforesaid, but the purchasers of the lots sold shall nevertheless have such rights of passage as aforesaid over the sites of such projected roads as for the time being shall not have been abandoned or modified under condition six.

Reservation to vendors of right to make sewers, &c., and to enter on lots for such purposes.

19. Each lot is sold subject to a right reserved to the vendors, their successors or assigns, either themselves to make or to contract with any local or municipal authority to make all such sewers and drains, and to lay all such pipes for the conveyance of water and gas beneath the surface of the property as may be necessary, in their opinion, for carrying out a system of drainage, or water, or gas supply for the estate now offered for sale; and for the purposes aforesaid, or any of them, to enter upon and to authorise any such local or municipal authority to enter upon all or any of the lots for the purpose of forming or making roads, and to execute all necessary works. In the deed of covenant to be prepared as aforesaid, provision shall be made for the carrying into effect of schemes of drainage and water and gas supply, or of any such schemes, as and when they or any of them shall become necessary, together with powers of entry to do all necessary works, including the sinking of wells, formation of reservoirs, erection of pumping-engines and houses and construction of tanks and otherwise, and the taking of land for the purposes aforesaid; and there shall be included in such deed such arbitration, compensation, and contribution clauses, and covenants, as the vendors may consider expedient to give effect to this condition, with the proviso, that as to the cost of any system of drainage, or water, or gas supply not executed by and at the expense of the local sanitary authority, the vendors shall be liable to contribute rateably in respect of any portion of the property (other than and except the sites of roads and streets) which may remain unsold at the time when the works aforesaid shall be executed. The vendors shall have powers of distress and perception of rents and profits, in addition to a right of action to enforce the payments of any sum to be payable by way of contribution under this condition; but no outlay shall be made in respect of any such scheme as aforesaid if the said scheme shall have been disapproved of in writing by a majority of the persons for the time being entitled to one or more lot or lots of the property now offered for sale within one month after a previous notice by the vendors, or their successors or assigns, in some public newspaper usually circulating within the borough of A—— of their intention to commence and execute the said scheme, and no such scheme shall be commenced until after the expiration of one month from the publication of such notice. Every owner for the time being of any lot shall pay a proportion of the expenses incurred by the vendors in giving effect to this condition, according to the value of the lot held by him, in manner to be provided in the said deed of covenant.

LXXVIII. *CONVEYANCE by way of* RELEASE *of* REMAINDER *in fee to* TENANT FOR LIFE, *the tenant for life covenanting to pay Succession duty.*

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*remainderman*], of, &c., of the one part, and [*tenant for life*], of the other part:

Recitals: of title of parties;

WHEREAS under an indenture of settlement dated, &c., and made, &c., the hereditaments hereinafter conveyed stand limited and assured to the use of the said [*tenant for life*] and his assigns during his life, with remainder to the use of the said [*remainderman*], his heirs and assigns;

of agreement for purchase of remainder;

AND WHEREAS the said [*tenant for life*] has agreed with the said [*remainderman*] for the purchase of the remainder in fee simple of the said [*remainderman*], expectant on the decease of the said [*tenant for life*], in the said hereditaments hereinafter conveyed, at the price of £——:

of arrangement as to succession duty.

AND WHEREAS upon the treaty for the said sale it was agreed that any succession duty which may become payable in respect of the said hereditaments hereinafter conveyed, upon the decease of the said [*tenant for life*], shall be paid by the said [*tenant for life*], and that he shall enter into the covenant hereinafter contained in respect of such succession duty.

Testatum.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the sum of £—— paid by the said [*tenant for life*] to the said [*remainderman*], of which sum of £—— the said [*remainderman*] hereby acknowledges the receipt, the said

Conveyance.

[*remainderman*] hereby grants, releases, and, as beneficial owner, conveys unto the said [*tenant for life*] and his heirs,

Parcels.

ALL THAT, &c. [*parcels*],

Habendum.

TO HOLD all the premises UNTO AND TO THE USE of the said [*tenant for life*], his heirs and assigns, subject to the estate for life therein of the said [*tenant for life*], To the intent that the said estate for life may become merged and extinguished in the remainder and inheritance of the same premises, and that the said [*tenant for life*] may be henceforth seised of or entitled to the same premises for an estate in fee simple in possession;

Covenant for payment of succession duty.

AND the said [*tenant for life*] hereby covenants with the said [*remainderman*] to pay and discharge any succession duty which may become payable in respect of the premises hereby conveyed upon the death of him the said [*tenant for life*], as and when such duty shall

LXXVIII. Release of Remainder in Fee to Tenant for Life.

become payable, and to keep effectually indemnified the said [*remainderman*], his heirs, executors, and administrators, against such succession duty and every part thereof, and all actions, proceedings, costs, charges, claims, and demands whatsoever for or on account of the same (*n*).

In witness, &c.

LXXIX. *CONVEYANCE in* Fee *on the* Purchase *of a* Remainder *in Fee, subject to a* Mortgage *affecting the entire Inheritance, which is paid off by the Purchaser, but is assigned to a Trustee for him, to be kept on foot as against the Tenant for Life* (*o*).

THIS INDENTURE, made the —— day of ——, ——, Between [*mortgagee*], of, &c., of the first part; [*vendor*], of, Parties.

(*n*) This covenant does not seem to be strictly necessary, as it is the general rule that on the sale of a reversionary interest the payment of succession duty on its falling into possession is payable by the purchaser, in the absence of stipulation to the contrary.

(*o*) The incumbrances are here kept on foot in order to be made available during the life of the tenant for life, for which period the purchaser is entitled to receive the interest on the principal sums in the character of mortgagee. On the decease of the tenant for life the purchaser's remainder falls into possession, and he of course takes the entire income as absolute owner. In the converse case of a tenant for life paying off mortgages affecting the inheritance, the incumbrances are often in like manner preserved from extinguishment, in order that the tenant for life may be entitled to stand in the relation of mortgagee with respect to the reversion or remainder. Remarks on the precedent in the text.

It is to be borne in mind that the powers of the latter, under the Settled Land Act, 1882, are incapable of being released: see sect. 50 (2); and, in the event of their being exercised by a sale, the purchaser of the remainder would have only an interest in the purchase-money, as capital money arising under the Act, and not in the land itself.

By the stat. 31 Vict. c. 4, sect. 1, it is enacted that—"No purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal property, shall hereafter [1st January, 1868] be opened or set aside merely on the

LXXIX. **Conveyance of Remainder in Fee to Purchaser, and Transfer of Mortgage.**

&c., of the second part; [*purchaser*], of, &c., of the third part; and [*trustee*], of, &c., of the fourth part: WHEREAS, by an indenture of mortgage dated, &c., and made, &c., in consideration of the sum of £—— paid by the said [*mortgagee*] to the said [*late owner*], the hereditaments hereinafter conveyed were assured to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso for redemption thereof upon payment by the said [*late owner*], his heirs or assigns, unto the said [*mortgagee*], his executors, administrators, and assigns, of the sum of £——, with interest at the rate of 5 per cent. per annum, on the —— day of ——: AND WHEREAS the said [*late owner*] died on or about the —— day of ——, in 18—: AND WHEREAS by an indenture dated, &c., and made between the [*present tenant for life*], of the first part; the said [*vendor*], therein described as the only son of the said [*tenant for life*], of the second part; and [A. B.], of the third part, in consideration of the natural affection which she bore to her son, the said [*vendor*], the said [*tenant for life*] granted and released the said hereditaments (subject to the aforesaid mortgage), unto the said [A. B.], his heirs and assigns, To the use of the said [*tenant for life*], during her life, without impeachment of waste, with remainder to the use of the said [*vendor*], his heirs and assigns: AND WHEREAS the principal sum of £—— still remains due and owing to the said [*mortgagee*], upon the said mortgage security, but all interest upon the same has been paid up to the date of these presents: AND WHEREAS the said [*purchaser*] has contracted with the said [*vendor*] for the purchase of the remainder or reversion in fee simple, expectant on the decease of the said [*tenant for life*], of and in the said hereditaments hereinafter conveyed, subject to the said sum of £——, secured to the said [*mortgagee*] as aforesaid, and the interest henceforth to become due on the same, at the price of £——: AND WHEREAS, upon the treaty for the said sale, it was agreed that the sum of £——, part of the said purchase-

Recital of mortgage in fee.

Death of late owner.

Conveyance to the present vendor of a remainder in fee, expectant on an estate for life, limited to his mother, the donor.

State of mortgage debt.

Contract for purchase of remainder in fee, subject to incumbrances.

Of arrangement with regard to mortgage;

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ground of under value." And by sect. 2, "The word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired." This enactment does not affect the jurisdiction of the Court as to unconscionable bargains with expectant heirs: see *Tyler* v. *Yates*, L. R. 11 Eq. 265; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484.

LXXIX. **Conveyance of Remainder in Fee to Purchaser, and Transfer of Mortgage.**

money, should be paid to the said [*mortgagee*] in discharge of his said mortgage debt, and that he make such assignment of the said debt and conveyance of the said hereditaments hereby conveyed as hereinafter contained, to the intent and for the purposes hereinafter appearing: AND WHEREAS, upon the treaty for the said sale, it was also agreed that the said [*purchaser*] should pay any succession duty which may become payable in respect of the said hereditaments hereby conveyed, upon the decease of the said [*tenant for life*], and should enter into such covenant in respect thereof as hereinafter appears. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— paid by the said [*purchaser*] to the said [*mortgagee*], at the request and by the direction of the said [*vendor*], of which sum of £—— the said [*mortgagee*] and [*vendor*] hereby acknowledge the receipt and payment as aforesaid respectively, the said [*mortgagee*], by the direction of the said [*purchaser*], hereby assigns and, as mortgagee, conveys unto the said [*trustee*] All that the said sum of £—— so due and owing on the security of the hereinbefore recited indenture of mortgage, and the interest due and to become due thereon, and the benefit of all securities for the same, To HOLD the same UNTO the said [*trustee*], his executors, administrators, and assigns, IN TRUST nevertheless for the said [*purchaser*], his executors, administrators, and assigns, and to assign and dispose of as he or they shall, from time to time, direct or appoint, and in the meantime to permit the same to attend the inheritance of the said hereditaments hereby conveyed, to the intent that the same mortgage-debt may be kept on foot as a subsisting charge upon the hereditaments hereby conveyed, and that the said [*purchaser*], his executors, administrators, and assigns, may be entitled and enabled to receive the interest henceforth during the life of the said [*tenant for life*] to become due and payable, and in order to preserve the same from all mesne charges and incumbrances, if any. AND THIS INDENTURE FURTHER WITNESSETH that, in pursuance of the said agreement and in consideration of the premises, and also in consideration of the further sum of £—— (making, together with the said sum of £—— so paid to the said [*mortgagee*] as aforesaid, the total price or sum of £——) paid by the said [*purchaser*] to the said [*vendor*], of which sum of £—— the said [*vendor*] hereby

and as to payment of succession duty.

Testatum.

Assignment of mortgage-debt.

Habendum to trustee, in trust for purchaser.

Further *testatum.*

Conveyance of remainder.

LXXIX. Conveyance of Remainder in Fee to Purchaser, and Transfer of Mortgage.

acknowledges the receipt, the said [*mortgagee*], at the request and by the direction of the said [*vendor*] testified as aforesaid, hereby grants and, as mortgagee, conveys, and the said [*vendor*] hereby grants, confirms, and, as beneficial owner, conveys unto the said [*purchaser*] and his heirs, ALL, &c. [*describe parcels*], TO HOLD all the premises hereby granted UNTO the said purchaser during the life of the said [*tenant for life*], TO THE USE of the said [*trustee*], his heirs and assigns, with all powers and provisions given by or contained in the hereinbefore recited indenture of mortgage, and subject to the right or equity of redemption to which the same premises are now subject under or by virtue of the same indenture, IN TRUST nevertheless for the said [*purchaser*], his heirs and assigns, and as a protection against mesne incumbrances as aforesaid, And from and after the decease of the said [*tenant for life*], then TO THE USE of the said [*purchaser*], his heirs and assigns, Freed and discharged thenceforth from all principal moneys and interest secured by and from all claims and demands under the same indenture, to the intent that the said mortgage-debt and interest and all securities for the same may thenceforth merge in the inheritance of the premises hereby granted, and be extinguished accordingly [*Covenant by purchaser to pay succession duty, ante*, p. 598].

Habendum (*p*).

IN WITNESS, &c.

Alternative form of *habendum*.

(*p*) According to the form in the text, the legal estate in the property is, during the life of the tenant for life, vested in the trustee; the following *habendum* may, if desired, be substituted therefor, whereby the legal estate will be immediately vested in the purchaser:—

"TO HOLD all the premises hereby granted UNTO the said [*purchaser*] and his heirs during the life of the said [*tenant for life*] TO THE USE of the said [*purchaser*], his heirs and assigns, subject nevertheless and charged with the said sum of £—— and interest hereby assigned unto the said [*trustee*], his executors, administrators, and assigns, in trust as aforesaid, to the intent that the charge created by the hereinbefore recited indenture of mortgage may remain during the life of the said [*tenant for life*] a subsisting charge upon the premises hereby granted, and be vested in the said [*trustee*], his executors, administrators, and assigns, in trust as aforesaid, And from and after the decease, &c. [*as in the text*]."

LXXX. *CONVEYANCE in* Fee *of* Freehold Reversion *to a* Lessee *by a* Mortgagee *and a* Mortgagor, *pursuant to an* Option *of* Purchasing *contained in the* Lease (*q*).

THIS INDENTURE, made the —— day of ——, 18—, Between [*mortgagee*], of, &c., of the first part; [*mortgagor*], of, &c., of the second part; and [*purchasing lessee*], of the third part: Whereas by an indenture of mortgage dated, &c., and made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, the messuage and hereditaments hereinafter described and hereby conveyed were, with other hereditaments, conveyed to the use of the said [*mortgagee*] by way of mortgage to secure the payment to the said [*mortgagee*], his executors, administrators, and assigns, on the —— day of ——, 18—, of the sum of £——, with interest thereon, at the rate of —— per cent. per annum: And whereas at the date of the indenture of lease next hereinafter recited, the said [*mortgagor*] was seised of the said hereditaments hereinafter described and hereby conveyed for an estate in fee simple in possession, subject to the said mortgage, but otherwise free from incumbrances: And whereas by an indenture of lease dated, &c., and made between the said [*mortgagee*] of the first part, the said [*mortgagor*] of the second part, and the said [*lessee*] of the third part, the said [*mortgagee*] demised and the said [*mortgagor*] demised and confirmed unto the said [*lessee*], his executors, administra-

Parties.

Recitals: of mortgage;

of mortgagor's seisin subject to mortgage;

of lease.

(*q*) This conveyance may, if desired, be made by an indenture supplemental to the lease; if so, add, after the description of the parties, the words:—

"And supplemental to an indenture of lease, dated, &c., and made, &c., whereby a messuage and hereditaments at ——, in the county of ——, therein particularly described, were demised unto the said [*lessee*], his executors, &c., from, &c., for the term, &c., at the rent thereby reserved and subject to the covenants, &c., therein contained."

There will, in that case, be no need to recite the proviso as to purchase of the reversion, and the recitals will commence with the state of the mortgage-debt. The lease will throughout be referred to as "the principal indenture" and the mortgage as "the indenture of mortgage recited or referred to in the principal indenture."

LXXX. Conveyance by Mortgagee and Mortgagor to Lessee of Freehold Reversion.

tors, and assigns, ALL THAT messuage, &c. [*describe parcels fully from the lease*], To hold the same premises unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, 18—, for the term of —— years, at the yearly rent of £—— thereby reserved and subject to the covenants on the part of the lessee, and conditions therein contained; And in the indenture now in recital was contained a proviso that if the said [*lessee*], his executors, administrators, or assigns should, before the —— day of ——, 18—, give to the person or persons for the time being entitled to rents and profits of the hereditaments comprised in the same indenture —— calendar months' notice of his desire to purchase the freehold reversion in such hereditaments expectant on the determination of the said term, then the said [*mortgagee*] and [*mortgagor*], and their respective heirs and assigns, and all other necessary parties (if any) would, on or before the expiration of such notice, and upon payment of the sum of £—— together with interest thereon at the rate therein mentioned as from the expiration of the said notice until completion of the purchase, and of all rent accrued due up to the time of such completion, convey the premises comprised in the said indenture of lease unto the said [*lessee*], his executors, administrators, and assigns, in fee simple in possession free from incumbrances, or as he or they should direct: AND WHEREAS the said principal sum of £—— is now owing upon the security of the said indenture of mortgage, together with interest for the same as from the —— day of ——, 18—; AND WHEREAS the said [*lessee*], in pursuance of the hereinbefore recited proviso in that behalf contained in the said indenture of lease, has recently given to the said [*mortgagee*] and [*mortgagor*] respectively notice in writing under his hand declaring his desire to purchase the freehold reversion of and in the hereditaments comprised in the said indenture of lease expectant on the determination of the said term, and requiring the said [*mortgagee*] and [*mortgagor*] to convey the same hereditaments accordingly in manner hereinafter appearing: AND WHEREAS the said [*lessee*] has duly paid all rent accrued due up to the date of these presents in accordance with the reservation thereof contained in the said inden-

Parcels.

Proviso giving lessee option to purchase reversion (*r*):

of state of mortgage debt;

of notice by lessee of intention to purchase;

of payment of rent due;

(*r*) This seems the best form of such a proviso, where leaseholds are in mortgage.

LXXX. Conveyance by Mortgagee and Mortgagor to Lessee of Freehold Reversion.

ture of lease as the said [*mortgagee*] and [*mortgagor*] hereby respectively acknowledge: AND WHEREAS it has been agreed that the sum of £—— to be paid by the said lessee, pursuant to the hereinbefore recited proviso contained in the said lease for the purchase of the said hereditaments hereinbefore described and hereby conveyed, shall be paid to the said [*mortgagee*] in part payment of the mortgage debt of £—— so owing to him as aforesaid. NOW THIS INDENTURE WITNESSETH that, in pursuance of the hereinbefore recited proviso in this behalf contained in the said indenture of lease and of the said agreement, and in consideration of the sum of £—— now paid to the said [*mortgagee*] by the said [*lessee*] at the request and by the direction of the said [*mortgagor*] in part payment of the said mortgage debt of £—— so owing to the said [*mortgagee*] as aforesaid, of which sum of £—— the said [*mortgagee*] and [*mortgagor*] hereby acknowledge the receipt and payment in manner aforesaid respectively, the said [*mortgagee*] hereby grants, releases and as mortgagee conveys, and the said [*mortgagor*] hereby grants, releases and, as beneficial owner, conveys and confirms unto the said [*lessee*] and his heirs, ALL THAT and those the messuage and hereditaments comprised in the said indenture of lease, and therein and also hereinbefore described, TO HOLD all the premises UNTO AND to the use of the said [*lessee*], his heirs and assigns, SUBJECT to the said term of —— years created by the hereinbefore recited indenture of lease, to the intent that the same term may henceforth be absolutely merged in the reversion and inheritance in fee simple of the premises hereby conveyed, expectant on the determination of the said term, and be extinguished; BUT FREED AND DISCHARGED from all principal and interest moneys intended to be secured by the said indenture of mortgage, and from all claims and demands under or by virtue of the same indenture [*acknowledgment by mortgagee of lessee's right to production of documents of title, ut ante*, p. 381].

of agreement as to payment of purchase-money.

Testatum.

Conveyance of freehold reversion.

Parcels.

Habendum,

subject to term to be merged in the fee simple,

free from mortgage.

IN WITNESS, &c.

SCHEDULE OF DEEDS AND DOCUMENTS OF TITLE.

LXXXI. *SURRENDER of a* LEASE *by way of* SALE *to the* REVERSIONER *in fee; (by endorsement on the lease).*

Parties.

THIS INDENTURE, made the —— day of —— 18—, BETWEEN the within-named [*lessee*] of the one part, and [*reversioner*], of, &c., of the other part: WHEREAS by an

Recitals: of conveyance of freehold reversion;

indenture dated, &c., and made between the within-named [*lessor*] of the one part, and the said [*reversioner*] of the other part, for the consideration therein mentioned, the premises demised by the within-written indenture were (with other hereditaments) conveyed and assured to the use of the said [*reversioner*], his heirs and assigns, subject, nevertheless, as to the premises demised by the within-written indenture, to

of agreement for purchase of lessee's interest.

the term of —— years thereby created: AND WHEREAS the said [*reversioner*] has agreed with the said [*lessee*] for the purchase of the estate and interest of the said [*lessee*] of and in the said premises, for the residue of the said term, to the intent that the same term may be merged and extinguished in manner hereinafter appearing, for the price of £——:

Testatum.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*lessee*] by the said [*reversioner*], of which sum of £—— the said [*lessee*] hereby acknowledges the receipt, the said [*lessee*] hereby assigns and surrenders, and as beneficial owner conveys UNTO the said [*reversioner*], his heirs and assigns, All and singular the messuage, hereditaments, and premises comprised in and demised by the within-written indenture, TO THE INTENT that the said term of —— years created by the within-written indenture may be merged and absolutely extinguished in the freehold reversion and inheritance of the same premises. [AND THIS INDENTURE FURTHER WITNESSETH, that in further

Second *testatum.*

Release of lessor's covenants (*s*).

(*s*) The second *testatum* will, of course, only be necessary where there are covenants on the part of the lessor for renewal of the lease or otherwise, besides the usual covenant for quiet enjoyment.

Any *past* breaches of the lessee's covenants should be expressly released as in the text, *mutatis mutandis*, or by a separate instrument. All rent up to the surrender will be recoverable on the covenant to pay rent: see stat. 33 & 34 Vict. c. 35; and *Att.-Gen.* v. *Cox*, 3 H. L. C. 240; *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; *Re South Kensington Co-operative Stores*, 17 Ch. D. 161.

pursuance of the said agreement, and for the consideration aforesaid, the said [*lessee*] hereby releases and discharges the said [*reversioner*] from the several covenants for, &c. [*specify any particular covenants*], and from all other covenants and conditions contained in the within-written indenture, and on the part of the lessor to be performed or observed, and from all actions, proceedings, costs, charges, damages, expenses, claims and demands, for or in respect of the said covenants and conditions, or any of them, or for or in respect of any provision, matter, or thing, contained or mentioned in the within-written indenture.] LXXXI. **Surrender of Lease to Reversioner.**

IN WITNESS, &c.

LXXXII. *CONVEYANCE in* FEE *of* FREEHOLDS *which are* SUBJECT *to a* LEASE *by the* LESSOR *and* LESSEE. VARIATIONS *where* PART *of the* PROPERTY *comprised in the Lease is* NOT INCLUDED *in the Sale.*

THIS INDENTURE (*t*), made the —— day of ——, 18—, BETWEEN [*lessor*] of, &c., of the first part; [*lessee*] of, &c., of the second part; and [*purchaser*] of, &c., of the third part: WHEREAS the said [*lessor*] is seised of the hereditaments hereinafter described and hereby conveyed in fee simple, subject nevertheless to an indenture of lease dated the —— day of ——, 18—, and made between the said [*lessor*] of the one part, and the said [*lessee*] of the other part, whereby the same hereditaments [*together with other hereditaments*] were demised unto the said [*lessee*], his executors, administrators, and assigns, to hold the same from the —— day of ——, 18—, for a term of —— years, at the yearly rent of £——, and subject to the covenants on the part of the [*lessee*] and conditions therein contained: AND WHEREAS the said [*lessor*] has agreed with the said [*purchaser*] for the sale to him of the said hereditaments hereinafter described and

Parties.

Recitals: of title of lessor subject to lease;

of agreement for sale, and surrender of lease;

(*t*) If this conveyance, being of part only of the property comprised in the lease, contains a covenant for apportionment of the rent, it will apparently require a stamp of 10*s.*, in addition to the *ad valorem* duty on the purchase-money. Stamp.

LXXXII. **Conveyance of Freeholds by Lessor and Lessee.**

hereby conveyed for the price of £——; And the said [*lessee*] has consented in consideration of the sum of £——, part of the said purchase-money, to concur in these presents for the purpose of surrendering his interest in the said hereditaments in manner hereinafter appearing: [And whereas the said [*lessor*] has agreed henceforth to accept the yearly rent of £—— as the rent apportioned in respect of the residue of the hereditaments comprised in the said lease, other than the hereditaments hereby conveyed, instead of the said yearly rent of £—— reserved by the said lease in respect of the whole of the hereditaments therein comprised]. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the sum of £—— now paid by the said [*purchaser*] as to the sum of £——, part thereof to the said [*lessor*], and as to the sum of £——, the residue thereof, by the direction of the said [*lessor*] to the said [*lessee*], of which sums of £—— and £——, making together the sum of £——, the said [*lessor*] and [*lessee*] acknowledge the receipt and payment in manner aforesaid respectively, the said [*lessor*] hereby grants and as beneficial owner conveys, and the said [*lessee*] hereby assigns, surrenders, and as beneficial owner conveys unto the said [*purchaser*] and his heirs All that, &c., [*describe parcels*]; To hold all the premises, unto and to the use of the said [*purchaser*], his heirs and assigns, To the intent that the said term of —— years may [so far as relates to the premises hereinbefore described and hereby conveyed] be absolutely merged in the freehold reversion and inheritance in fee simple thereof: [And the said [*lessor*] for himself and his assigns hereby covenants with the said [*lessee*], that he, the said [*lessor*], his heirs and assigns, will henceforth accept the said yearly rent of £——, so apportioned as aforesaid, in respect of the residue of the hereditaments comprised in the said lease other than the said premises hereinbefore described and hereby conveyed. [*Acknowledgment by lessee of purchaser's right to production of lease*].]

[of agreement as to apportioned rent.]

Testatum.

Habendum.

[Covenant by lessor with lessee to accept apportioned rent.]

In witness, &c. (*u*).

(*u*) If this covenant is here inserted it is advisable that a memorandum thereof should be endorsed on the lease. It might be more convenient that there should be endorsed on the lease, which will of course remain in the lessee's custody, a short deed

LXXXIII. *CONVEYANCE in* FEE *by way of* RELEASE *of* FREEHOLDS *by* TRUSTEES *and* EXECUTORS *of a* WILL *to a* CO-TRUSTEE *and* CO-EXECUTOR *purchasing under a Provision in the Will* (*x*), *where there have been recent* ALTERATIONS *of Buildings, &c., on the Property.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [A. D.], of, &c., [B. D.], of, &c., and [C. D.], of, &c., of the one part, and the said [C. D.] of the other part: WHEREAS by an indenture dated the —— day of ——, 18—, and made between [*vendor*] of the first part, [*testator*] of the second part, and [*grantee to uses*] of the third part, the several messuages, tenements, and hereditaments hereinafter described according to the present nature and description thereof, and hereby conveyed, were by and according to the then description thereof, which is as follows: [*here describe parcels verbatim from the deed*], conveyed or assured to such uses as the said [*testator*] should by deed appoint; And in default of such appointment to the use of the said [*testator*] during his life, with remainder to the use of the said [*grantee to uses*], his executors and administrators, during the life of the said [*testator*], in trust for the said [*testator*] and his assigns, with remainder to the use of the said [*testator*], his heirs and assigns: AND WHEREAS the said [*testator*] duly made and executed his will dated the —— day of ——, 18—, and thereby appointed his sons, the said [A. D.], [B. D.], and [C. D.], trustees and executors thereof, and thereby, after giving certain specific legacies, gave and devised all his real estate whatsoever and wheresoever unto his trustees upon trust to pay and apply the rents and profits thereof as in the said will

Parties.

Recitals: of conveyance of property by former description thereof, to uses to bar dower in favour of testator;

of will devising property to three trustees;

---

embodying the covenant in the text, and a proviso that in other respects the covenants and conditions of the lease should remain in force with respect to the property unsold.

(*x*) The form of conveyance given in this Precedent operates as a release to the purchasing trustee by his co-trustees of their estates in joint tenancy with him. Another mode of conveyance in such a case is by making a grantee to uses party to deed, where the property would be conveyed by all the trustees, with *habendum* to the grantee to uses to the use of the purchasing trustee, his heirs and assigns.

LXXXIII. **Release in Fee to Trustee Purchasing from Co-Trustees under Power in Will.**

mentioned during the life of [*wife*], the said testator's wife; And from and immediately after the decease of his said wife upon trust to sell all the testator's real estate as therein mentioned; And the testator by his said will expressly declared that either of his said sons (notwithstanding his being one of the trustees of the said will) might become a purchaser of the testator's real estate, or any part thereof, either at a public auction or by private contract or valuation; And that any purchase made by him should be as valid as if he had not been appointed a trustee of his said will: And WHEREAS the said [*testator*] duly made and executed a codicil dated the —— day of ——, 18—, to his said will, but did not thereby in any wise alter or affect the hereby-recited devise of his real estate contained in his said will: And WHEREAS the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, save by the said codicil, and without having revoked or altered the said codicil, and the said will and codicil were on the —— day of ——, 18—, duly proved in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice: And WHEREAS the said [*wife*] died on the —— day of ——, 18—: And WHEREAS since the date of the hereinbefore-recited indenture of the —— day of ——, 18—, the messuage or tenement therein secondly described and thereby conveyed some time since ceased to be occupied and used as a public-house, and the same messuage and the outbuildings thereof have been recently pulled down, and on the site thereof have been erected the offices now occupied by Messrs. —— hereinafter described and expressed to be hereby conveyed; And there have been divers other alterations in the nature and character of the several messuages or tenements and buildings described in the same hereinbefore-recited indenture, and thereby conveyed: And WHEREAS the said [C. D.] has agreed with his co-trustees by virtue of the power or liberty given to him by the hereinbefore-recited will, to purchase the said hereditaments hereinafter described and hereby conveyed for the sum of £——, and has requested them to convey the same to him accordingly: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in execution of the trusts of the hereinbefore-recited will of the said [*testator*], and in consideration of the sum of £—— now paid to the said [A. D.], [B. D.], and

of declaration giving to trustees power to purchase property;

of codicil;

of death of testator, &c.;

of death of testator's wife;

of alterations in the property;

of agreement by one of the trustees to purchase the property.

Testatum.

Release by two trustees to co-trustee.

[C. D.], as trustees of the said will (of which sum of £—— the said [A. D.], [B. D.], and [C. D.] hereby acknowledge the receipt), they the said [A. D.] and [B. D.] hereby respectively grant and release, and as trustees convey unto the said [C. D.], All [*here describe parcels according to their present description*]: To HOLD all the hereditaments and premises hereby conveyed UNTO AND TO THE USE of the said [C. D.], his heirs and assigns, free and discharged from all and every the trusts and provisions of the hereinbefore-recited will of the said [*testator*].

LXXXIII. Release in Fee to Trustee Purchasing from Co-Trustees under Power in Will.

Parcels.

Habendum.

IN WITNESS, &c.

LXXXIV. *CONVEYANCE by* EXECUTORS *in* EXECUTION *of a* CONTRACT *for* SALE *by their* TESTATOR (*y*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*executor*], of, &c., and [*executor*], of, &c., of the

Parties.

(*y*) Where a vendor enters into a contract binding on himself and the purchaser, he becomes *sub modo* a trustee for the purchaser: *Lysaght* v. *Edwards*, 2 Ch. D. 499; and upon his death before the completion of the transaction, the legal estate will devolve in the same way as his trust or mortgaged estates. If, therefore, he died before 1st January, 1882, the legal estate would vest in his heir or in the devisees of his trust estates: *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582. But if he died on or after that day, the legal estate in his freeholds will vest in his personal representatives, under sect. 30 of the Conveyancing and Law of Property Act, 1881: see *ante*, p. 33, and p. 465, n. (*u*), and *ante*, Vol. III., sub tit. MORTGAGES, p. 965. If it should happen that any contract made by a vendor, who died before the date mentioned, still remains unexecuted, the precedent in the text can readily be adapted to the case by adding the heir or devisees party or parties of the first part, and then, after stating that the purchase-money is paid to the executors, making the heir or devisees convey.

Devolution of legal estate on vendor's death before conveyance.

The precedent in the text is available whether the contract be such as could have been enforced by the vendor or not. By section 4 of the Conveyancing and Law of Property Act, 1881, it is enacted that "Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this

LXXXIV. **Conveyance by Executors Pursuant to Testator's Contract.**

one part; and [*purchaser*], of, &c., of the other part: WHEREAS [*vendor*], of, &c., being seised for an estate in fee simple in possession of the hereditaments hereinafter conveyed, entered into a contract in writing with the said [*purchaser*], for the sale to him of the fee simple, free from incumbrances, of the hereditaments hereinafter conveyed, at the price of £——; AND WHEREAS the title of the said [*vendor*] was accepted by the said [*purchaser*] (*z*); but the said contract remained unexecuted and unperformed at the time of the decease of the said [*vendor*], the said purchase-money of £—— not having been paid by the said [*purchaser*], nor any conveyance of the said hereditaments made or executed by the said [*vendor*]; AND WHEREAS the said [*vendor*] duly made his will, dated, &c., and thereby appointed the said [*executors*] to be the executors thereof; AND WHEREAS the said [*vendor*] died on the —— day of ——, 18—, without having revoked or altered his said will, and the same was duly proved on the —— day of ——, 18—, by the said [*executors*], the executors therein named, in the Principal Registry of Her Majesty's High Court of Justice, Probate Division; AND WHEREAS the said [*purchaser*] has requested the said [*executors*] to carry into effect the said contract entered into by the said [*vendor*], by conveying and assuring the said hereditaments, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said contract, and in consideration of the sum of £—— paid to the said [*executors*] by the said [*purchaser*], the receipt of which sum of £—— they the said [*executors*] do hereby

Recitals:

of contract for sale;

that contract was not executed in vendor's life-time;

of purchaser's request for conveyance.

Testatum.

Act, have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract." The section is not to affect the beneficial interests under the vendor's will, if he made one, or the rights of his heir or next of kin if he died intestate; and does not apply to cases of death before the commencement of the Act. It seems, therefore, that where a contract is binding upon a vendor and also upon the purchaser, and the vendor dies, the legal estate will pass to his personal representatives, under sect. 30, while, if the contract be binding upon the vendor but not upon the purchaser, then, if the latter insist upon its performance, the conveyance can be made under the 4th section.

It is to be noted that the 4th section applies only to freeholds, though it will include estates *pur autre vie* in freeholds.

(*z*) Omit this part of this recital if the contract was not binding on the purchaser at the date of the vendor's death.

LXXXIV. Conveyance by Executors Pursuant to Testator's Contract.

acknowledge, They the said [*executors*] (*a*) hereby respectively grant, and as personal representatives of the said [*vendor*] deceased convey unto the said [*purchaser*] and his heirs, ALL THAT [*parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns. Conveyance.

IN WITNESS, &c. *Habendum.*

LXXXV. *CONVEYANCE of* FREEHOLDS *purchased by a* TESTATOR *who has* DEVISED *them to one for life, with remainder to two as* TENANTS IN COMMON (*b*).

THIS INDENTURE, made, &c., BETWEEN [*vendor*], of, &c., and [*vendor*], of, &c., of the first part; [*purchaser's widow*], of, &c., of the second part; [*purchaser's daughter*], of, &c., of the third part; [*purchaser's son*], of, &c., of the fourth part; and [*grantee to uses*] of the fifth part: WHEREAS the said [*vendors*], being seised of the hereditaments herein- Parties. Recitals:

(*a*) If the contract was not binding upon both parties (see note (*y*), *ante*, p. 612), add here :—

"by virtue of the Conveyancing and Law of Property Act, 1881."

(*b*) It is incumbent on an executor or administrator, before he pays for an estate which was purchased by his deceased testator or intestate, to ascertain that the title is such as a court of equity would have compelled the purchaser to accept; for, unless this is the case, his payment of the purchase-money out of the testator's or intestate's personal estate would be a misapplication of the assets. If the purchaser in his lifetime did any act which amounted to an acceptance of the title, this would preclude all inquiry into its sufficiency as between his representatives; but, as the payment of his purchase-money is not necessarily such an act, the executor would not be relieved from the necessity of satisfying himself of the validity of the title by the fact that the purchase-money had been paid in the testator's lifetime; since, if the title were bad, it would be his duty to insist upon the contract being rescinded and the purchase-money returned; the money so returned would go in augmentation of the personal estate. Duty of an executor in regard to estates purchased by his testator.

LXXXV. **Conveyance to Devisees of Deceased Purchaser.**

after conveyed for an estate of fee simple in possession, free from incumbrances, in equal shares as tenants in common, did on the —— day of ——, 18—, contract with [*testator*], of, &c., for the sale to him of the unincumbered fee-simple of the said hereditaments hereinafter conveyed, at the price of £——: And whereas the said [*testator*], shortly after the date of the said contract, paid the said purchase-money of £—— to the said [*vendors*], as they hereby respectively acknowledge, but no conveyance or other assurance of the said land and hereditaments, save as is hereinafter mentioned, was made to the said [*testator*] in pursuance of the said contract: And whereas the said [*testator*] made his will dated the —— day of ——, and thereby gave, devised, and bequeathed all and singular his real estates, both freehold and copyhold, and all his personal estate and effects not thereinbefore specifically disposed of, to his wife, the said [*widow*], and his son, the said [*son*], their heirs, executors, administrators, and assigns, upon trust to pay unto or permit his said wife [*widow*], and her assigns, during her life, to receive and take the rents and issues, dividends, interest, and annual produce thereof respectively; and after her decease, then as to one undivided moiety of his said real and personal estate and effects, upon trust for his daughter, the said [*daughter*], then the wife of [*husband*], her heirs, executors, administrators, and assigns, absolutely; and in the event of her death in his (the said testator's) lifetime, then upon other trusts in his said will mentioned; And as to the other undivided moiety of his said real and personal estate and effects, upon trust for his son, the said [*son*], his heirs, executors, administrators, and assigns, when and as he should attain the age of twenty-one years, and in case he should die under the age of twenty-one years, then upon other trusts in the said will mentioned; And the said [*testator*] appointed the said [*widow*] executrix of his said will: And whereas the said [*testator*] died in the month of ——, 18—, without having altered or revoked his said will, leaving the said [*widow*], his wife, and the said [*daughter*] and [*son*] him surviving, and the said will was duly proved by the said [*widow*], the executrix therein named, in the Principal Registry of Her Majesty's High Court of Justice, Probate Division: And whereas the said [*daughter's husband*] died in the month of ——, 18—, and the said [*son*] attained the age of twenty-one years on the

of contract for sale;

of payment of purchase-money;

of purchaser's will.

Death of testator.

Death of daughter's husband.

—— day of ——, 18—: AND WHEREAS the said [*widow*], and [*daughter*] and [*son*] have respectively now requested the said [*vendors*] to convey the hereditaments so purchased by the said [*testator*] as aforesaid in manner hereinafter mentioned, which they respectively have agreed to do: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said sum of £—— paid to the said [*vendors*] by the said [*testator*] in his lifetime, the receipt of which sum of £—— they the said [*vendors*] hereby respectively acknowledge, each of them the said [*vendors*], as to an undivided moiety of the hereditaments hereby conveyed, hereby grants, and as beneficial owner conveys unto the said [*grantee to uses*], ALL THAT, &c. [*describe parcels*], TO HOLD all the premises unto the said [*grantee to uses*] and his heirs, TO THE USE of the said [*widow*] and her assigns during her life; And from and after her decease, then, as to one undivided moiety of the premises, TO THE USE of the said [*daughter*], her heirs and assigns, for ever; And as to the other undivided moiety of the premises TO THE USE of the said [*son*], his heirs and assigns.

IN WITNESS, &c.

LXXXV. **Conveyance to Devisees of Deceased Purchaser.**

Application of devisees for conveyance.

Testatum.

Conveyance.

Parcels.

Habendum.

Declaration of uses.

LXXXVI. *CONVEYANCE on* SALE *by the* COURT *in an* ADMINISTRATION ACTION *by* PERSON *nominated by the* COURT *to* CONVEY *on behalf of an* INFANT, *and by* EQUITABLE MORTGAGEES (*c*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*person appointed to convey*], of, &c., of the first

Parties.

(*c*) By sect. 20 of the Trustee Act, 1850 (13 & 14 Vict. c. 60), the Court may appoint a person to convey lands and to release contingent rights of persons born or unborn in all cases in which the Court is by the Act empowered to make vesting orders relating to such lands or rights: see also sect. 30 of that Act, and the Trustee Act Extension Act, 1852 (15 & 16 Vict. c. 55), sect. 1. This power of appointment is not limited to

LXXXVI. **Conveyance of Freeholds of an Infant on Sale by Court in Administration Action.**

part; [*equitable mortgagees*], of, &c., of the second part; [*subsequent incumbrancer*] of the third part; and [*purchaser*] of the fourth part: WHEREAS the said [*equitable mortgagees*], on the —— day of ——, 18—, advanced to [*mortgagor*] the sum of £——, who deposited with them the title deeds of the said lands and hereditaments; AND WHEREAS [*recite any other charges or incumbrances*]; AND WHEREAS [*recite will of mortgagor devising the land to an infant in fee simple, and death of the testator and probate of his will; or the death of the mortgagor intestate, whereby the infant became entitled to the land as heir-at-law of the mortgagor*]; AND WHEREAS by an Order of the Chancery Division of Her Majesty's High Court of Justice made by Mr. Justice, &c., on the —— day of —— in an action (*d*) in which [*plaintiff*] was plaintiff and [*defendants*] were defendants, being an action for the administration of the estate of the said [*mortgagor*]. It was ordered that [*recite the inquiries as to real estate*]; AND WHEREAS the Chief Clerk of the said Judge by his certificate dated, &c., and filed, &c., certified that there was due to the said [*equitable mortgagees*] upon their said security the sum of £—— and no more, &c. [*recite certificate so far as material*]; AND WHEREAS by an Order made by Sir [A. B.], one of the Justices of the said Court, on the further consideration of the said action, on the —— day of —— it was, among other things, ordered that the real estate of the said testator [*or* intestate] should be sold with the approbation of the Judge, free from the incumbrances of such of the incumbrancers as should consent to the said sale, and subject to the incumbrances of such of the incumbrancers as should not consent to the said sale, and that the money to arise from the sale of the said real estate, or of such parts thereof respectively as should be subject to the incumbrances (if any) of such of the incumbrancers as should consent to the sale, should be applied, in the first instance in

Recitals:
of equitable mortgage by deposit of deeds;
of infant's title;
of order directing inquiries;
of Chief Clerk's certificate;
of order for sale;

cases where the owners of the property are under disability: see *Becket* v. *Sutton*, 19 Ch. D. 646. In a creditor's action for administration, the Court has jurisdiction where it is for the infant's benefit to direct a sale: *Field* v. *Moore*, 7 De G., M. & G. 691; see Seton, 739; the decree for sale binds in equity the interests of all persons not in existence, and the Trustee Act, 1850, enables the Court to convey the legal estate so as to bind such persons: *Basnett* v. *Moxon*, L. R. 20 Eq. 182.

(*d*) See as to creditors' administration actions by mortgagees, Seton, 825.

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payment of what should appear to be due to the said incumbrancers respectively according to their priorities; And that the money to arise by such sale should be paid into Court, to the credit of the said action to the account of, &c.; AND WHEREAS, in pursuance of the said Order, the said real estate was, on the —— day of ——, put up for sale by public auction at —— in —— lots with the consent of the said [*equitable mortgagees*] and [*other incumbrances*] free from incumbrances according to certain printed particulars of sale, wherein lot —— comprised the lands and hereditaments hereby conveyed; AND WHEREAS at the said sale the said [*purchaser*] was the highest bidder for and was declared to be the purchaser of the said lot —— at the price of £——, And the said [*purchaser*] thereupon paid to [*auctioneer*], the person appointed by the said Judge to receive the same, the sum of £—— by way of deposit, and the same sum has since been paid by the said [*auctioneer*] into Court to the credit aforesaid (*f*); AND WHEREAS the said Chief Clerk, on the —— day of ——, certified to the said Judge the result of the said sale, and such certificate, signed by the said Judge, was duly filed in the said action; AND WHEREAS by an order made in the said action on the —— day of ——, and in the matter of the Trustee Act, 1850, and of the Trustee Extension Act, 1852, it was ordered that the said [*purchaser*] should (*g*), on or

of sale by auction pursuant to order (*e*);

of purchase and payment of deposit;

of certificate of result of sale;

of order for payment of balance of purchase-money and interest, and for conveyance;

(*e*) If the sale was by private contract, say—

"AND WHEREAS the said [*person appointed to convey*], with the consent, &c., lately agreed with the said [*purchaser*], subject to the approval of the said Judge being obtained, for the sale to the said [*purchaser*] of the said hereditaments hereinafter described and hereby conveyed at the price of £——, and the said [*purchaser*] thereupon paid to the said [*person appointed to convey*] the sum of £—— by way of deposit, and the same sum has since been paid by the said [*person appointed to convey*] into Court to the credit aforesaid."

The next following recital will be omitted.

(*f*) If the title is forced upon the purchaser there will here follow a recital of the order of reference as to title, and of the Chief Clerk's certificate as to title.

(*g*) If the sale was by private contract, say—

"the said provisional contract was confirmed and ordered to be carried into effect, and it was further ordered that the said [*purchaser*]," &c.

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before the —— day of ——, pay into Court to the credit aforesaid the sum of £——, being the balance of the purchase-money of the lot so purchased by him as aforesaid after deducting the said sum of £—— so paid by way of deposit as aforesaid, together with interest on the said sum of £—— for interest thereon at the rate of —— per cent. per annum from the —— day of —— until payment of the same sum; And it was further ordered that, upon such payment as aforesaid being made, the said [*purchaser*] should be let into possession or into the receipt of the rents and profits of the said hereditaments as from the —— day of ——, 18—, and that all proper parties should execute a proper conveyance of the said lands and hereditaments hereby conveyed unto the said [*purchaser*], or as he should direct, such conveyance to be settled by the Judge (*h*). The Court being of opinion that the said [*infant*] was to be deemed possessed of the said lands and hereditaments hereby conveyed upon a trust within the meaning of the Trustee Act, 1850 (*i*), it was ordered that the said [*person appointed to convey*] be appointed to convey the said lands and hereditaments for the estate of the said [*infant*] therein (*k*); And whereas, in pursuance of the last-mentioned order, the said [*purchaser*], on the —— day of ——, paid into Court the sum of £—— [*balance of purchase-money*], and a further sum of £——, being interest thereon, to the credit aforesaid (*l*); And whereas the said [*equitable mortgagees*] and [*subsequent incumbrancer*] have agreed to join in these presents in manner hereinafter appearing; And whereas these presents have been settled and approved as a proper

of payment of purchase-money, &c.

(*h*) The conveyance is not usually ordered to be settled by the Judge unless there be a dispute as to title, or unless, as in the present case, there are parties under disability: see Dart, V. & P. 1118, 1218.

(*i*) See sect. 30 of the Act; and see *Foster* v. *Parker*, 8 Ch. D. 147; *Mellor* v. *Porter*, 25 Ch. D. 158.

(*k*) If the property belongs to a person of unsound mind, so found by inquisition, this order would have to be made in lunacy as well as in chancery: see *Herring* v. *Clark*, L. R. 4 Ch. 167.

(*l*) See the Rules of the Supreme Court of December, 1887, Ord. 51, r. 3 a. The Court will not, as a rule, make an order vesting the property in the purchaser before payment of the purchase-money, and though the same order may direct payment and also appoint a person to convey, the purchase-money must be paid into Court before completion.

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conveyance of the lands and hereditaments hereby conveyed, as appears by the signature of the Chief Clerk to the said Judge in the margin hereof. NOW THIS INDENTURE WITNESSETH that, in pursuance of the hereinbefore recited orders, and in consideration of said sums of £——, £——, and £——, making in the whole the sum of £—— so paid by the said [*purchaser*] as hereinbefore is mentioned, and of the premises, the said [*person appointed to convey*], by virtue and in exercise of the power or authority conferred on him by or under the hereinbefore recited order of the —— day of ——, 18—, and of every and any other power or authority enabling him for the purpose of conveying and assuring the estate and interest of the said [*infant*] in the said lands and hereditaments hereby conveyed, hereby conveys (*m*), and each of them the said [*equitable mortgagees*] and [*subsequent incumbrancer*] hereby, according to his estate and interest, releases and confirms and as mortgagee conveys unto the said [*purchaser*] and his heirs, ALL THAT [*describe parcels*], To HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, FREED and discharged from all claims and demands whatsoever under or in respect of the said sums of £—— so secured to the said [*equitable mortgagees*] and [*subsequent incumbrancer*] as aforesaid, and from all securities for the same sums respectively (*n*).

Testatum.

Conveyance.

Habendum.

IN WITNESS, &c.

(*m*) The person appointed to convey being expressed to convey "under an order of the Court," the statutory covenant against incumbrances will be here implied: see sect. 7, sub-sect. 1 (F.).

Where real estate is sold by order of the Court, beneficiaries cannot be required to covenant for title: see *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330.

(*n*) On a sale by auction, as in the present case, the conditions of sale usually provide that the title deeds and documents common to the whole of the property sold shall be delivered to the largest purchaser: see *ante*, sub tit. CONDITIONS OF SALE, Vol. II., p. 723. The conveyance to such largest purchaser will not, therefore, require any provision with regard to these documents; but, in the case of other purchasers, their conveyances should either include an acknowledgment and undertaking by the largest purchaser or be accompanied by a separate instrument containing such acknowledgment and undertaking: see *ante*, sub tit. ACKNOWLEDGMENTS, Vol. I., pp. 263, 265. If the acknowledgment, &c., are included in the conveyances, the largest purchaser must be

made a party thereto respectively, and they should contain recitals of the condition of sale relating to the documents and of the sale of the largest lot.

If, either on a sale by auction, by reason of one or more of the lots remaining unsold, or on a sale by private contract, it is desired to retain the title deeds on behalf of the infant, a question of some difficulty arises. The statutory acknowledgment and undertaking as to documents is only capable of being given by a person who "retains possession" of the documents: see sect. 9 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

A person appointed by the Court to convey is appointed only for that purpose, and is in no sense a trustee of the estate of the infant or other person, a part of whose property he conveys; having executed the conveyance he is *functus officio*, and can have no possible right to retain the documents relating to the estate; and he would probably and not unnaturally refuse to enter into any covenant for production and safe custody of the documents whereby he would incur any personal liability. He might indeed perhaps consent to enter into such a covenant, if expressed to be on behalf of the infant only, and so as not to impose any personal liability on himself, but such a covenant would be of at least doubtful efficacy; and the same remark would apply to a statutory acknowledgment and undertaking given in such terms. It is conceived that no such covenant or acknowledgment and undertaking could be held to bind the infant, who has no voice in the matter, so as to render him liable to damages for any loss, destruction of, or injury to the documents. A simple acknowledgment appears to be less open to objection; it would seem that a person appointed by the Court to convey is entitled and bound to convey according to the usual and settled practice, which, under the circumstances, would certainly include an acknowledgment to produce title deeds not delivered to the purchaser, and moreover a simple acknowledgment merely renders the infant liable to an order being made against him for production and delivery of copies, which would do little more than affirm and enforce the purchaser's equitable right, in the absence of such acknowledgment, with regard to production. The most satisfactory way out of the difficulty would be for the purchaser to stipulate by his contract that the documents should be delivered to him, and that he should give an acknowledgment and undertaking in relation thereto. If this cannot be done, it would seem that the purchaser must rely on his equitable rights as regards production; as to which see *ante*, p. 251; or, at most, content himself with a statutory acknowledgment.

The person appointed to convey must execute the conveyance in his own name.

LXXXVII. *SURRENDER and ADMITTANCE on sale of* COPYHOLDS *by* ORDER OF COURT *in a* PARTITION ACTION: *one of the vendors being an* INFANT, *a* PERSON APPOINTED *to* CONVEY SURRENDERS *on his behalf* (*o*).

MANOR OF ——(*p*): WHEREAS at a Court holden in and for the Manor of ——, in the County of ——, on the —— day of ——, 18—, the hereditaments hereinafter described were (*inter alia*) vested in [*vendor*], of, &c., [*vendor*], of, &c., and [*infant*], of, &c., who were then admitted tenants of the said manor to the same hereditaments in the following shares, that is to say, as to three ninth parts thereof to the use of the said [*vendor*], his heirs and assigns, according to the custom; and as to two ninth parts thereof to the use of the said [*vendor*], his heirs and assigns, according to the custom; and as to the remaining four ninth parts thereof to the use of the said [*infant*], his heirs and assigns, according to the custom: AND WHEREAS, by an order of the Chancery Division of Her Majesty's High Court of Justice, dated, &c., and made by Mr. Justice —— in an action in which the said [*vendor*] was plaintiff, and the said [*vendor*] and the said [*infant*] were defendants, being an action for the partition or sale of the lands and hereditaments devised by the will of the said [*testator*], it was ordered that an inquiry should be made what lands and hereditaments were devised by the will of the [*testator*] (*q*), and who were the persons interested therein and in what proportions, and for what estates and interests: AND WHEREAS the Chief Clerk of the said Judge, by his certificate dated, &c., and filed, &c., certified that the lands and hereditaments therein mentioned (being the lands and hereditaments hereby conveyed) were devised by the said will

Order for sale in partition action.

(*o*) See as to sales in actions for partition, *ante*, p. 68, and Vol. IV., p. 138, *et seq.*

As to orders appointing persons to convey copyholds under the Trustee Act, 1850, see *Re Heys' Will*, 9 Ha. 221.

(*p*) As to the stamp duty payable in respect of this surrender, see sect. 77, sub-sect. 1 (b) of the Stamp Act, 1870, *ante*, p. 372. Stamp.

(*q*) The suit was for the partition of lands held under a will. In a conveyance under similar circumstances of freeholds the will would be recited; but this is not necessary in dealing with copyholds, as the next preceding entry on the Court Rolls would fully explain the circumstances of the case.

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of the said [*testator*] to the said [*vendor*], [*vendor*], and [*infant*], in the shares aforesaid, and that the said [*vendor*], [*vendor*], and [*infant*] were the only persons interested in the said lands and hereditaments, and that the said [*infant*] was an infant under the age of 21 years: AND WHEREAS, by an order made, &c. [*recite order for sale*], it was declared that in case of such sale the said [*infant*] would be a trustee within the meaning of the Trustee Act, 1850, of the hereditaments thereinbefore directed to be sold for the purchaser or purchasers thereof for all the estate and interest of the said [*infant*] therein; And the said [A. B.] was appointed to surrender and assure the said lands and hereditaments for all the estate and interest of the said [*infant*] therein: AND WHEREAS [*recite sale mutatis mutandis and payment of deposit, purchase-money, &c., ut ante*, p. 497]: AND WHEREAS the amounts of this surrender and admittance have been settled by the Judge to whose Court the said action is attached, as appears by the certificate of his Chief Clerk, dated, &c.: NOW TO THIS COURT came in their respective proper persons the said [*vendor*], of, &c., and [*vendor*], of, &c., and the said [A. B.] of, &c. (the said [A. B.] surrendering on behalf of the said [*infant*] in pursuance of the aforesaid order) and did, according to their respective estates and interests (as regards the said [*vendor*] and [*vendor*]), and the estate and interest of the said [*infant*], as regards the said [A. B.], in the said lands and hereditaments, and in consideration of the said moneys so paid into Court as aforesaid, surrender into the hands of the lady of the said manor by the rod according to the custom thereof: ALL THAT [*describe parcels*], To the use of [*purchaser*], of, &c., his heirs and assigns, at the will of the lady according to the custom of the said manor.

ADMITTANCE UPON THE PRECEDING SURRENDER.

WHEREUPON to the Court comes in his proper person the said [*purchaser*], and prays to be admitted tenant to the tenements and premises hereinbefore described; to whom the said lady of the manor, by the deputy steward thereof, grants seisin thereof by the rod according to the custom of this manor; To HOLD to him, his heirs and assigns, at the will of the lady, according to the custom of the said manor, by the rents and services therefor due and of right accustomed, and he pays —— for a fine, and his fealty is respited and he is admitted tenant.

LXXXVIII. *CONVEYANCE of* Copyholds *by a* Mortgagee *and a* Trustee *of* Bankrupt (*r*).

THIS INDENTURE (*t*), made the —— day of ——, 18—, Between [*mortgagee*], of, &c., of the first part; [*bankruptcy trustee*], of, &c., of the second part; and [*purchaser*], of, &c., of the third part: Whereas, at a customary court holden for the manor of ——, in the county of ——, on the —— day of ——, [*bankrupt*] was admitted tenant of the hereditaments hereby conveyed, To hold the same unto the said [*bankrupt*], his heirs and assigns, by copy of court-roll, at the will of the lord, according to the custom of the said manor: And whereas, by an indenture dated the —— day of ——, and made between the said [*bankrupt*], of the one part; and the said [*mortgagee*] of the other part; the said [*bankrupt*], in consideration of the sum of 4,000*l.* lent to him by the said [*mortgagee*], covenanted to surrender into the hands of the lord of the said manor, All and singular the hereditaments whatsoever of him the said [*bankrupt*] holden of the said manor, the particulars whereof are stated in the thereunder written schedule (which schedule comprises the hereditaments hereby conveyed), To the use of the said [*mortgagee*], his heirs and assigns, by way of mortgage, for securing to the

Parties (*s*).

Recitals: of bankrupt's admission;

of mortgage;

(*r*) As to realising a mortgagee's security in bankruptcy, see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 9 (2), and 2nd Schedule 29; and Bankruptcy Rules, 1883, rr. 65, *et seq.* Realization of security in bankruptcy.

With respect to the conveyance of copyholds of a bankrupt, see *ante*, p. 335. The purchaser will be entitled, under this deed, to be admitted tenant on the Court Rolls. Conveyance of bankrupt's copyholds.

If the mortgagee had been admitted and had subsequently died, the concurrence of his customary heir at law or his devisee of trust and mortgage estates would now be necessary, as was formerly the case with freeholds (see *ante*, p. 33), in order to convey the legal estate: see the Copyhold Act, 1887 (50 & 51 Vict. c. 73), sect. 45.

(*s*) The bankrupt may be compelled to join in the conveyance: see *ante*, p. 335. If he does so he will be made a party of the second part, and he will covenant to surrender the copyholds to the purchaser, if required so to do, but as the right to admittance passes without surrender, and as the annulment of an adjudication does not affect anterior proceedings under it, the concurrence of the bankrupt seems of little use, and is commonly dispensed with. Whether the bankrupt should be a party.

(*t*) As no surrender will be required, this deed will be the principal instrument of conveyance, and will be liable to *ad valorem* duty accordingly. Stamp.

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said [*mortgagee*], his executors, administrators, and assigns, the payment of the sum of 4,000*l.* lent by the said [*mortgagee*] to the said [*bankrupt*], with interest for the same; But no surrender was ever made or executed in pursuance of the said covenant: AND WHEREAS, by an order of the County Court of ——, holden at ——, in Bankruptcy, dated the —— day of ——, 18—, the said [*bankrupt*] was duly adjudicated a bankrupt, and on the —— day of ——, 18—, the said [*trustee*] was duly appointed trustee of the estate and effects of the said [*bankrupt*], and such appointment was on the —— day of ——, 18—, certified by the Board of Trade: AND WHEREAS by an order of the said County Court, dated, &c., and made on the application of the said [*mortgagee*], it was ordered that accounts and inquiries should be taken for ascertaining the principal, interest, and costs, due upon the said mortgage, and that the said [*trustee*], as such trustee as aforesaid, should sell the hereditaments hereby conveyed either by public auction or private contract, and that the said [*mortgagee*] and [*trustee*] should join in the conveyance to the purchaser: AND WHEREAS the said [*trustee*], in pursuance of the said last mentioned order, has agreed with the said [*purchaser*] for the sale to him of the hereditaments hereby conveyed for the price of £——: AND WHEREAS, as appears by the certificate of the Registrar of the said Court, dated, &c., the said principal sum of £—— secured by the hereinbefore recited indenture of mortgage, is now due and owing to the said [*mortgagee*] upon the same mortgage, together with arrears of interest as from the —— day of ——, 18—, up to the present date, amounting to the sum of £——, and costs amounting to £—— (*u*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said order of the —— day of ——, 18—, and in consideration of the sum of £—— now paid by the said [*purchaser*] as follows, that is to say, the sum of £—— part thereof, to the said [*trustee*] in payment of his costs, charges, and expenses of and occasioned by the said application, and of and incident to the said sale, and the further sum of £—— other part thereof to the said [*mortgagee*] in payment of the amount due to him upon the said mortgage as aforesaid, with the consent of the said [*trustee*]

of proceedings in bankruptcy;

of order for accounts and sale.

of agreement for sale;

of state of mortgage debt.

Testatum.

(*u*) As to the application of the purchase-money, see Bankruptcy Rules, 1883, r. 67.

(testified by his executing these presents), and the sum of £——; the balance thereof to the said [*trustee*], of which several sums of £——, £——, and £—— respectively the said [*mortgagee*] and [*trustee*] hereby acknowledge the receipt and payment as aforesaid respectively, the said [*mortgagee*] hereby grants and conveys (*x*), and the said [*trustee*], by virtue and in pursuance of the power and authority vested in him by the Bankruptcy Act, 1883, in this behalf, hereby confirms and conveys (*x*) unto the said [*purchaser*] and his heirs, ALL THAT [*parcels*]: TO HOLD all the premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, for ever, FREED AND DISCHARGED of and from the hereinbefore recited indenture of the —— day of ——, 18—, and all moneys intended to be thereby secured and all claims and demands under or by virtue of the same indenture, but subject nevertheless to the rents and services accustomed to be paid and performed, in respect of the same hereditaments, to the lord of the said manor of ——.

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Parcels.

Habendum.

IN WITNESS, &c.

LXXXIX. *CONVEYANCE of* EQUITABLE INTERESTS *in* COPYHOLDS *to a* PURCHASER *by Tenants in Common* (*y*).

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of, &c., and [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS [*testator*], of, &c., duly made and executed his will dated the —— day of ——, and thereby gave and devised (among other hereditaments) all the copyhold hereditaments hereinafter described unto and to the use of [*trustees*] upon trust

Parties.

Recitals: of devise of copyholds to testator's wife for life, remainder to such of his daughters as should survive her in fee;

(*x*) This being "a deed conferring the right to admittance to copyhold or customary land," the expression "in pursuance of the said order" will imply statutory covenants against incumbrances: see sect. 7, sub-sect 1 (F) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

Implied covenants.

(*y*) See as to conveyances by deed of equitable interests in copyholds: *ante*, p. 332.

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to pay the rents and profits thereof to his wife [*wife*], for her life, and after her decease upon trust for such one or more of his (the said testator's) daughters as should be living at the time of the decease of his said wife, or should have died in her lifetime, leaving lawful issue them respectively surviving, and their respective heirs and assigns, equally as tenants in common (*z*), with remainders over on default or failure of such issue, as therein is mentioned: And whereas the said testator died on the —— day of ——, and his said will was, on the —— day of ——, duly proved in the District Registry at —— of the Probate Division by the executors therein named: And whereas the said [*wife*] died on the —— day of ——, 18—: And whereas the said [*vendors*], parties hereto, and [*other daughter*], now the wife of [A. B.], are the only surviving children of the said testator; And [*deceased daughter*] now deceased, the only other child of the said testator, died on the —— day of —— without issue: And whereas at a court held on the —— day of ——, for the manor of ——, whereof the hereditaments hereinafter devised are holden, the said [*trustees*] were admitted tenants of the said hereditaments, upon the trusts, and with and subject to the powers and provisions in the hereinbefore-recited will declared and contained of and concerning the same: And whereas the said [*vendors*] have contracted with the said [*purchaser*] for

of death of testator;

of death of wife;

that vendors are only children and co-heiresses;

of admittance of tenant for life.

Alienation or destruction of contingent estates in copyholds.

(*z*) Under these limitations the daughters took remainders in fee simple, contingent on their surviving their mother or leaving issue: see *Lethieullier* v. *Tracy*, 3 Atk. 793; *Buckworth* v. *Thirkell*, 3 Bos. & P. 652, n.; *Doe* d. *Herbert* v. *Selby*, 3 B. & C. 926; *Greene* v. *Ward*, 1 Russ. 264.

The union of a life estate with a vested remainder will not destroy mesne contingent remainders in copyholds: 2 Roll. Abr. 794, pl. 6; *Mildmay* v. *Hungerford*, 2 Vern. 243; *Habergham* v. *Vincent*, 2 Ves. 204; *Stansfield* v. *Habergham*, 10 Ves. 282; *Roe* v. *Briggs*, 16 East, 413, *ante*, p. 582; nor will a surrender of copyholds by a contingent remainderman operate by estoppel: *Doe* d. *Blacksell* v. *Tomkins*, 11 East, 185.

It is clear that a contingent estate in or right to copyholds may be released to the person immediately entitled, after he has been admitted: *Hull* v. *Sharbrooke*, Cro. Jac. 36; *Kite* v. *Queinton*, 4 Rep. 25; Co. Litt. 59 a; *Doe* d. *Milner* v. *Brightwen*, 10 East, 595. If, therefore, all the parties to whom the contingent estates are limited are in esse and *sui juris*, a good title to the fee may be made by a surrender of all the vested estates to the use of the purchaser, and a release to him after his admittance by the owners of the contingent estates.

LXXXIX. Conveyance of Equitable Interest in Copyholds.

the sale to him of the two equal undivided third parts or shares of and in the said copyhold hereditaments, to which they the said [*vendors*] are equitably entitled under the trusts of the said will and the inheritance thereof according to the custom of the said manor for the price of £——: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [*vendors*] in the proportions following, that is to say, the sum of £——, part thereof, to the said [*one vendor*], and the sum of £——, the remainder thereof, to the said [*other vendor*], of which several sums of £—— and £——, making together the sum of £——, the said [*vendors*] hereby acknowledge the receipt respectively, they the said [*vendors*] respectively, according to their respective shares, estates and interests in the hereditaments hereinafter described, hereby grant, and as beneficial owners convey unto the said [*purchaser*], and his heirs, ALL THOSE two equal undivided parts or shares of or to which the said [*vendors*] respectively are so equitably entitled as aforesaid of and in [*describe parcels*], TO HOLD the said hereditaments and premises UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns, henceforth for ever, at the will of the lord, according to the custom of the said manor of ——, by and under the accustomed rents and services.

Testatum.

Devisees in remainder convey to purchaser.

Parcels.

Habendum to purchaser and his heirs.

IN WITNESS, &c. (*a*).

(*a*) It will be proper to enter on the Court Rolls either the deed itself, or a short memorandum to the following effect:—

"BE IT REMEMBERED, that, by indenture, dated, &c., and made between, &c., the said [*releasors*] did release unto the said [*purchaser*], and his heirs, all their estate and interest, whether present or future, vested or contingent, in ALL [*parcels*], to which hereditaments the said [*purchaser*] was admitted on the —— day of ——."]

Memorandum of release to be entered on the court-rolls.

XC. *BARGAIN and* SALE *of* COPYHOLD LAND *by the* TESTAMENTARY DONEES *of a* POWER (*b*).

Parties.

THIS INDENTURE (*c*), made the —— day of ——, 18—, BETWEEN [*vendors*], of, &c., of the one part, and

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As to the best mode of a testator's creating a power or trust for the sale of copyholds.

(*b*) Where it is intended that copyhold estates shall be sold by trustees immediately on the testator's decease, it is advisable not to devise the property to them, but merely to create an authority to sell, or to devise the property to such uses as the trustees shall appoint, in order to avoid the necessity and consequent expense of the trustees being admitted. As donees of the power of sale of course they are not entitled, nor can they be compelled to be admitted. The trustees have only a power of nominating on a sale the persons who are entitled to claim admittance from the lord (and on payment of a single fine), and to whose benefit the surrender to the use of the will, when such surrender was necessary to its validity, enured: *Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400. The same effect now arises from the will alone: see *Reg.* v. *Wilson*, 10 B. & C. 80; *Glass* v. *Richardson*, 9 Ha. 698; 2 De G. M. & G. 658. But the expedient for avoiding the necessity of the admittance of the trustees can only be adopted when the sale is to take place immediately on the testator's decease; for the lord would be entitled to require that the vacancy in the tenancy occasioned by the death of the late copyholder, should be supplied by the admittance of the person to whom the property had devolved, and in case of default, after proclamation in the usual manner, might seize *quosque*. The sale, therefore, should be made in sufficient time to prevent this, otherwise the heir must be admitted in order to save the property from the lord's seizure. If the copyhold is devised for life, and is to be sold on the determination of that estate, of course it is impossible to prevent the necessity of the devisee for life being admitted; but even then it may be worth while to give the trustees a power of sale only instead of (or in addition to) an estate, if the fine on admittance is considerable, in order to avoid the fine in regard to the remainder in fee. This precaution is only available where by the custom the fine is apportioned, and a part only is payable upon the admittance of the tenant for life. The admittance of the remainderman is frequently taken, upon payment of a fine, at the same time with the admittance of the tenant for life: see *Richardson* v. *Kensit*, 6 Scott, N. R. 419. Generally the admittance of the particular tenant is the admittance of the remainderman or reversioner, and no fine is due in respect of the remainder. But, by special custom, in some places, although the remainderman is not required to be admitted, a fine is due on the death of the particular tenant; in others the admittance of the remainderman is requisite, either at

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Stamp.

(*c*) This deed is chargeable with an *ad valorem* stamp, under sect. 77 of the Stamp Act, 1870: see *ante*, p. 372.

[*purchaser*], of, &c., of the other part: WHEREAS the commissioners named in, &c., by the award dated the —— day of ——, 18—, of the commissioners appointed under an Act of Parliament passed in the —— and —— years of the reign of Her present Majesty, c. ——, intituled "An Act," &c. (which award was duly confirmed by the Inclosure Commissioners for England and Wales on the —— day of ——,

XC. Bargain and Sale of Copyholds under a Power in a Will.

Recitals: of the award of commissioners under an inclosure act;

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the time of the admittance of the tenant for life or subsequently; and in all these cases either a full fine is paid on the admittance of the particular tenant, and then none is due in respect of the remainder, or the fine is apportioned, part being paid on the admittance of the particular tenant and part on that of the remainderman: *Barnes* v. *Corke*, 3 Lev. 308, 4 Rep. 22; *Blackburne* v. *Graves*, 2 Lev. 107, 1 Mod. 120; *Doe* d. *Whitbread* v. *Jenny*, 5 East, 522; *Kensington* v. *Mansell*, 3 Ves. 240; *Dean of Ely* v. *Caldecott*, 1 Moo. & Sc. 633; *Phypers* v. *Eburn*, 3 Scott, 634; *Doe* d. *Winder* v. *Lawes*, 7 A. & E. 195. See further, as to the principle on which fines upon admittances are assessed, *Reg.* v. *Dullingham*, 8 A. & E. 858; *Wilson* v. *Hoare*, 10 A. & E. 236; *Shepherd* v. *Woodford*, 5 M. & W. 608; *Bence* v. *Gilpin*, L. R. 3 Ex. 76; *Bristow* v. *Booth*, L. R. 5 C. P. 80; *Fraser* v. *Mason*, 11 Q. B. D. 574; *Johnstone* v. *Earl Spencer*, 30 Ch. D. 581.

As to the lord's right to seize in default of the heir coming in to be admitted.

The following points have been decided as to the proceedings of the lord of a manor, on the default of the heir of his tenant coming in to be admitted:—First, that the lord may avail himself of the right to seize, which had accrued to the preceding lord, under whose will he claimed. Secondly, that there must be three proclamations, on the death of a copyholder, for the heir to come in to be admitted, before the lord can seize, which proclamations should be made at three *consecutive* courts, there being no distinction in this respect between a seizure for a forfeiture and a seizure *quosque;* and, therefore, there having been a lapse of several courts between the second and third proclamations, the precept and seizure thereon could not be supported: *Doe* d. *Bover* v. *Trueman*, 1 B. & Ad. 736.

As to sales of freeholds under a common-law authority.

The precedent in the text might also be adapted to the case of freeholds being sold under a common law authority in a will, though such authorities are, at the present day, not often created of freehold lands, as the reasons which recommend their adoption in regard to copyholds do not apply to freeholds. The conveyancer, in preparing a bargain and sale by the donees of such a power, will bear in mind the difference between the effect of such an instrument and a bargain and sale, which derives its effect from the Statute of Uses. The common law bargain and sale raises a seisin, on which uses may be limited, and therefore the property may be conveyed to limitations, including a power of appointment, which it is well known a statutory bargain and sale does not admit of, as the instrament does not raise a seisin, but only transfers a use. It is also to be observed, that a bargain and sale under a common law authority does not require inrolment.

XC. Bargain and Sale of Copyholds under a Power in a Will.

18—), All those allotments or pieces or parcels of land hereinafter expressed to be duly conveyed, were (with other lands) allotted and awarded unto [*testator*], of, &c.; And the said commissioners so appointed as aforesaid by their said award, in pursuance of a power in that behalf contained in the hereinbefore mentioned Act, determined that the allotment made to the said [*testator*] should be copyhold of the manor of ——, in the aforesaid county of ——, the same being allotted for and in respect of —— acres of land with a messuage thereon, which he then held by copy of court roll of the said manor, and of the rights of common appendant or appurtenant thereto: AND WHEREAS, at a court holden for the said manor, on the —— day of ——, 18—, the said [*testator*] was admitted by virtue of the said award to the said hereditaments so allotted to him as aforesaid; To HOLD the same for such estate and interest as he before the execution of the said award had in the said —— acres of land with the said messuage thereon, in respect of which the said allotment was made; AND WHEREAS the said [*testator*] duly made and executed his will, dated the —— day of ——, 18—, and thereby appointed the said [*vendors*] executors and trustees thereof, and directed them to sell and dispose of all his copyhold messuages, lands, and hereditaments whatsoever (*d*), [*or*, and devised all his copyhold messuages, lands, and hereditaments whatsoever, to such uses as the said [*vendors*] should appoint, and in default of appointment then to the use of the said [*vendors*], their heirs and assigns, as for trust to sell the same hereditaments as therein mentioned]: AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, and the same was on the —— day of —— following proved in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice; AND WHEREAS the said [*vendors*] have agreed with the said [*purchaser*] for the sale to him of the said hereditaments so allotted to the said [*testator*], deceased as aforesaid, in fee simple in possession, free from all incumbrances, at the price of £——. NOW THIS INDENTURE WITNESSETH, that, in con-

of testator's admission to inclosure allotment;

of will creating power of sale;

of death of testator;

of contract for sale.

Testatum.

(*d*) If the terms of the power or direction to sell are in any way special they should be fully recited, as also the receipt clause, if any.

XC. Bargain and Sale of Copyholds under a Power in a Will.

sideration of the sum of £——, now paid to the said [*vendors*] by the said [*purchaser*], of which sum they the said [*vendors*] hereby acknowledge the receipt, the said [*vendors*], in pursuance of the direction [*or* power] and authority for this purpose contained in the hereinbefore-recited will, and of all other powers and authorities enabling them in this behalf, hereby bargain, sell, appoint, and as trustees convey unto the said [*purchaser*], his heirs and assigns, ALL THOSE several pieces or parcels of land, containing together —— acres and —— roods, situate in the parish of ——, in the county of ——, so as aforesaid allotted and awarded to the said [*testator*] by the said commissioners for executing the hereinbefore-recited Inclosure Act, and particularly described in the schedule hereunder written, TO HOLD all the premises UNTO AND TO THE USE of him the said [*purchaser*], his heirs and assigns for ever, at the will of the lord or lady and according to the custom of the aforesaid manor; and by and under the suits, services, rents, fines, and heriots theretofor due and of right accustomed (*e*).

Parcels.

Allotment.

Habendum.

IN WITNESS, &c.

(*e*) A bare authority without an estate, given to several persons nominatim, cannot be exercised by the survivors or survivor, unless an intention to that effect is expressed: Co. Litt. 112 b. But it seems that, when the power is given to several by a general description, as "sons of A.," &c., it may be exercised by two or more survivors, and, in the case of executors, donees of the power by that description, even by a sole survivor. But if the power is given to persons by name, who are appointed executors, it is doubtful whether the rule as to executors will apply: Sugd. Pow. 128; Chance on Powers, 239; *Bonifaut* v. *Greenfield*, Cro. El. 80.

Power to several executors, &c.

Where a bare authority was given to several executors, and one of them refused the office, the others were disabled at the common law from exercising the power: Co. Litt. 113 a. But by stat. 21 Hen. 8, c. 4, where some of several executors, donees of a power of this kind over freeholds, disclaim, the rest may validly exercise the power. And it has been held that copyholds, though not expressly named in the statute, are within its operation: *Peppercorn* v. *Wayman*, 5 De G. & S. 230. And now, under sect. 16 of the stat. 22 & 23 Vict. c. 35 (set out *ante*, Vol. III., p. 716), a power of sale is exerciseable, where realty is charged with debts, &c., by the acting executors or executor.

Stat. 21 Hen. 8, c. 4.

XCI. *ASSIGNMENT of* LEASEHOLDS *to the* PURCHASER *of* ONE *of* SEVERAL LOTS *sold by* AUCTION; COVENANTS *by the* PURCHASERS *to Pay the* PROPORTION *of the* RENT, *and to observe the* COVENANTS *of the* LEASE *in respect of the* LOTS *purchased by them respectively.* POWERS *of* DISTRESS *and* ENTRY *to secure payment of apportioned rents and observance of Covenants by Purchasers of other Lots* (*f*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the first part; [*purchaser of lot* 1], of, &c., and [*purchaser of lot* 2], of, &c., of the second part (*g*); and [*purchaser of lot* 3], of, &c., of the third part:

Recitals: of lease (*h*):

WHEREAS by an indenture of lease dated, &c., and made, &c., the piece or parcel of land hereinafter described and hereby assigned was, together with other lands, demised unto the said [*lessee*], his executors, administrators, and assigns, to

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Sale of leaseholds in lots.

(*f*) On a sale by auction of leaseholds in lots, the two most usual modes of conveying the property are either by assignment to each purchaser of the lot purchased by him, as in the text of this Precedent, or by assigning the whole property comprised in the lease to the purchaser of a particular lot, who grants underleases of the other lots to their respective purchasers: forms of such last-mentioned assignment and underlease will be found in the two next following Precedents. The conditions of sale should specify which mode of conveyance is to be adopted: forms of such conditions will be found *ante*, sub tit. CONDITIONS OF SALE, Vol. II., pp. 826, 827.

A preferable mode of transferring the property is for the vendor to surrender the original lease, and for the lessor to grant fresh leases of the several lots to their respective purchasers at apportioned rents; but the lessor's consent to such an arrangement cannot always be obtained. In agreements for leases of building land, where a speedy resale of the property in lots by the builder is contemplated, it is very usual to stipulate that the lessor shall grant separate leases to the respective purchasers: see *ante*, sub tit. LEASES, Vol. III., p. 393 *et seq.*

(*g*) If the purchasers are numerous, it will be convenient, instead of here naming and describing them, to say "the several persons whose names and seals are subscribed in and affixed to the schedule hereunder written, of the second part;" And, &c.

Recital of sale by auction.

(*h*) It does not seem necessary in this case to recite the sale by auction. It is generally advisable to avoid the recital of a sale by auction, if possible, in order that the particulars and conditions of sale may not be put upon the title to the land.

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hold the same from the —— day of ——, 18—, for a term of 99 years, at the yearly rent of £——, and subject to the covenants on the part of the lessee and conditions therein contained: AND WHEREAS under or by virtue of divers assignments and acts in the law, and ultimately by an indenture dated, &c., and made, &c., the lands and hereditaments comprised in the said lease have become vested in the said [*vendor*] for the unexpired residue of the said term of 99 years, at the rent and subject to the covenants on the part of the lessee and conditions contained in the said indenture of lease: AND WHEREAS the said [*vendor*] has agreed with the said [*purchaser of lot* 3] for the sale to him of the piece or parcel of land hereinafter described and hereby assigned, being part of the lands comprised in the said indenture of lease, for the unexpired residue of the said term, for the price of £——: AND WHEREAS the said [*vendor*] has recently agreed with the said [*purchasers of lots* 1 *and* 2 (*i*)] for the sale to them respectively of certain other pieces or parcels of land (*k*), being the remainder of the lands and hereditaments comprised in the said indenture of lease, and the same have been or are intended to be assigned unto the said [*purchasers of lots* 1 *and* 2 (*l*)] by several indentures bearing even date with these presents: AND WHEREAS it has been agreed that the said [*purchasers of lots* 1 *and* 2] shall respectively enter into the covenants on their parts respectively and give to the said [*purchaser of lot* 3] such powers of distress and entry as are hereinafter contained. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser of lot* 3], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby assigns and, as beneficial

of mesne assignments;

of agreement for sale of lot 3;

of agreements for sale of other lots;

of agreements as to covenants, and powers of distress and entry.

Testatum.

Assignment.

(*i*) If the purchasers are numerous, say—
"has agreed with the said several parties thereto of the second part respectively, &c."

(*k*) If the purchasers are numerous, insert here:—
"which several pieces or parcels of land are particularly mentioned in the said schedule hereunder written opposite to names of the respective purchasers thereof."

(*l*) *Or*,
"to the several purchasers thereof respectively."

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owner, conveys unto the said [*purchaser of lot* 3], his executors and administrators, All that piece or parcel [*describe parcels*]: To HOLD all the same premises for all the residue now unexpired of the said term of 99 years, subject to the yearly rent of £——, being the amount apportioned in respect of the said premises hereby assigned of the yearly rent of £—— reserved by the hereinbefore recited indenture of lease, to be paid at the times and in manner appointed by the said indenture of lease, for the payment of the whole rent thereby reserved, and subject to the covenants on the part of the lessee and conditions therein contained, so far only as such covenants and conditions relate to the said premises hereby assigned; AND the said [*purchaser of lot* 3] hereby covenants with the said [*vendor*] in manner following, that is to say, That he the said [*purchaser of lot* 3], his executors, administrators, or assigns, will henceforth pay the said yearly rent of £—— so apportioned and agreed to be paid by him and them in respect of the premises hereby assigned; And also will perform and observe the covenants, conditions, and agreements in the said indenture of lease contained, on the part of the lessee to be performed and observed, so far only as the same relate to the said [*vendor*], his heirs, executors, and administrators, and the premises hereby assigned; AND ALSO that the said [*purchaser of lot* 3], his heirs, executors, or administrators, will keep indemnified from all actions, costs, proceedings, charges, damages, and expenses whatsoever by reason of the nonpayment of the said apportioned rent of £——, or of the non-performance of all or any of the said covenants, conditions, and agreements so far as the same relate to the premises hereby assigned. AND THIS INDENTURE FURTHER WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the premises each of them the said [*purchasers of lots* 1 *and* 2] (*m*), but so far only as relates to the piece or parcel of land and premises so purchased by him as aforesaid, and to the acts, defaults, and omissions of himself, his executors, administrators, and assigns, in relation thereto, hereby, for himself and his assigns, covenants with the said [*purchaser of lot* 3] that they the said [*purchasers of lots* 1 *and* 2]

Parcels.

Habendum.

Covenant by purchaser to pay proportion of rent and perform covenants;

and to indemnify vendor therefrom.

Second *testatum.*

Covenants by purchasers of other lots to pay apportioned rents, &c.

(*m*) *Or,*

"each of them the said several parties hereto of the second part."

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respectively (*n*) and their respective executors, administrators, or assigns, will at all times hereafter duly pay the yearly rents of £—— and £—— respectively apportioned and agreed to be paid by them respectively in respect of the several pieces or parcels of land purchased by them respectively as aforesaid, and do, perform, and observe the covenants, conditions, and agreements in the said indenture of lease contained and on the part of the lessee to be performed and observed, so far as relates to the same pieces or parcels of land respectively; And also that they the said [*purchasers of lots* 1 *and* 2] respectively and their respective heirs, executors, or administrators, will at all times hereafter effectually keep indemnified the said [*purchaser of lot* 3], his heirs, executors, administrators, and assigns, from the said several apportioned rents so covenanted to be paid by them respectively, and from all actions, proceedings, costs, charges, damages, and expenses whatsoever by reason of the nonpayment of the same rents respectively, or of the non-performance or non-observance of all or any of the said covenants, conditions, and agreements: AND, FURTHER, that if the said [*purchaser of lot* 3], his executors, administrators, or assigns, shall at any time or

Power of distress (*o*).

(*n*) *Or,*

"they the said several parties hereto of the second part respectively."

Or,

"the several yearly rents set opposite to their respective names in the said schedule hereunder written, being the rents respectively apportioned," &c.

Whether powers of distress in assignments of leaseholds are within the Bills of Sale Acts.

(*o*) The question of inserting powers of distress of this kind has been incidentally referred to in the notes to several of the foregoing Precedents. It has been reserved for consideration in this place, as it is probably on the occasion of the sale of leasehold in lots that the question most frequently arises. These powers have long been inserted in conveyances intended to carry out arrangements of this kind, being generally regarded as affording to a purchaser an efficient and summary remedy in case of breach of obligations on the part of the other purchasers. But of late these powers are sometimes regarded with suspicion, and even (as it is believed) occasionally omitted through fear that their insertion may render the conveyance liable to registration under the Bills of Sale Acts, and otherwise subject to the provisions of those Acts.

Definitions of bills of sale.

The question turns upon the construction of sects. 4 and 6 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); and it is submitted that on a close examination of the wording of these

XCI. Assignment of Leasehold Lot to Purchaser.

times hereafter pay any sum or sums of money, or sustain or incur any costs, charges, damages, or expenses by reason or

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sections, it will appear that any apprehension as to the validity of powers of distress in assignments such as that given in the text, are groundless; and that these powers may be safely inserted in such and similar assignments in accordance with the general practice. Sect. 4 of the Act of 1878, so far as material, is as follows: "In this Act, unless there be something in the subject or context repugnant to such construction, the expression 'bill of sale' shall include authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." Then follow certain specified exceptions, none of which appear to be material to the present purpose. Sect. 6 is as follows:

"Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress."

The Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), sect. 3, adopts the definition of the term "bill of sale" given in the Act of 1878, "except as to bills of sale and other documents mentioned in sect. 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply."

Extent and scope of the definitions considered.

Now, it may be admitted that the powers of distress are given partly and, indeed, principally to secure payment of money, *i.e.*, of the apportioned rents as they become payable, and it seems to follow that if these powers are within the definitions given in sects 4 or 6 of the Act of 1878, they are within the mischief not only of that Act but also of the Act of 1882. But it is submitted that the powers under consideration do not come within any of these definitions.

Assignments of leaseholds repugnant to construction including them within definition of bills of sale.

In the first place it is to be observed that the definitions of bills of sale given in sect. 4 of the Act of 1878 are not to apply if there is anything in the subject or context repugnant to such construction. Now it is conceived that no transaction could possibly be imagined which, as regards its subject matter, and the mode in which it is carried into effect, could be more repugnant than the conveyance of leasehold lots by means of separate assignments to their respective purchasers, to a construction which would include such assignments, by reason of their containing powers of distress, in these definitions. In the case of *Hall* v. *Comfort*, 18 Q. B. D. 11, it was held that an attornment clause in a mortgage is not within the mischief aimed at by the Bills of Sale Acts. Of course this decision has no direct bearing on the question under consideration, but it seems to show the spirit in which the Courts may be

on account of the breach, non-performance, or non-observance of the covenants for payment of the said apportioned yearly

expected to deal with attempts to strain the definitions of bills of sale given by the Acts so as to include instruments which, it may be presumed, were not intended by the Legislature to be so included.

Powers of distress in assignments are not a security for an actual debt;

Again, in order to fall within sect. 4 of the Act of 1878, a licence or authority to take possession of personal chattels must be "as security for *any debt*." At the date of the assignments in all probability no actual debt relating to the premises is owing to anybody, and certainly there is no such debt owing to the person to whom the power of distress is given. It would seem that the words "any debt" in sect 4 must be restricted to actual debts having regard to the language of sect. 6, which speaks of powers of distress given "by way of security for any present, future, or contingent debt;" and also that the licence or authority to take chattels must be given to or in favour of the person to whom a debt is owing to bring the instrument within the definition.

nor a security for any debt.

But further it is conceived that the powers of distress now under consideration are not given as a security for "*any debt*" whatever, whether present, future, or contingent. According to the form in the text the powers are only exerciseable on breach of the covenants by the donors of the powers to pay their respective proportions of the rent reserved by the lease, and to indemnify the donee of the powers therefrom; and these covenants do not create or secure any debt either to the original lessor or to the donee, on which action could be maintained. The liability to the lessor is created by the lease, not by the assignments, and is a liability to pay, not an apportioned part of the rent, but the whole rent, which liability (though it may be of the nature of a contingent debt) is not in any way secured by the powers of distress. On the other hand, as between the donors and donees of the powers, what these covenants create is not a debt, but a contingent liability on the part of the donors of the powers, in case of default on their parts in paying the rent and observing the covenants of the lease, to pay damages for breach of covenant to the donee; and accordingly the latter cannot take proceedings under the covenants until he has actually incurred loss by distress, or by paying the rent due to the lessor under threat of distress, or otherwise: see *Lloyd* v. *Dimmack*, 7 Ch. D. 398; and such damages must necessarily be unliquidated damages, as they will include costs and expenses which cannot be ascertained until the matter is disposed of, and the accounts relating thereto taken and settled. It therefore seems clear that the powers of distress in question are given as a security, not for any debt, but in respect of such contingent liability to pay unliquidated damages.

Inasmuch as powers of distress operate so as to confer a right at law and not merely in equity, it is obvious that the powers under consideration do not come within the definition of bills of sale, as being agreements conferring an equitable right to chattels: see *Reeves* v. *Barlow*, 12 Q. B. D. 436.

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rents hereinbefore covenanted to be paid, or of the other covenants, conditions, and agreements hereinbefore covenanted to be performed and observed by the said [*purchasers of lots* 1 *and* 2] respectively (*p*), and their respective executors, administrators, and assigns, or any of such covenants, conditions, or agreements, then and in every such case, and so often as the same shall happen it shall be lawful for the said [*purchaser of lot* 3], his executors, administrators, or assigns, to enter and distrain into and upon the piece or parcel of land, part of the premises comprised in the hereinbefore recited indenture of lease, belonging to such of them the said [*purchasers of lots* 1 *and* 2], or their respective executors, administrators, or assigns, by or by reason of whose acts, defaults, or omissions such sum or sums of money, costs, charges, damages, or expenses as aforesaid shall have been paid, sustained, or incurred by the said [*purchaser of lot* 3], his executors, administrators, or assigns, and the distress and distresses then and there found to dispose of in due course of law, as landlords may do in respect of distresses for rent reserved by lease, and to apply the proceeds of such distress or distresses in or towards payment or satisfaction of all sums of money, costs, charges, damages, and expenses so paid, sustained, or incurred as aforesaid; AND ALSO to enter into and upon such last-mentioned piece or parcel of land or any part thereof, and receive and take the rents and profits thereof for the use of him and them the said [*purchaser of lot* 3], his executors,

Power of entry (*q*).

Rent reserved by assignments not for purposes of security only.

Finally it is submitted that powers of distress in assignments of leases are clearly not within sect. 6 of the Act of 1878. Even if these powers could be regarded as a security for a contingent debt (as to which see above), so as to bring the instrument whereby they are given within the definition, the section adds the important qualification that in order to be so included, the instrument must reserve or make payable a rent "for the purpose of such security only." In assignments of parts of lands comprised in a lease, the rent is reserved not by the assignments but by the lease; and though the original rent is apportioned and the apportioned rents are "made payable" by the assignments, yet they are not so made payable by way or security for any debt.

(*p*) *Or*,

"the said several parties hereto of the second part respectively."

(*q*) As to powers of entry for breach of covenants of this kind, see *ante*, p. 559, note (*h*).

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administrators, and assigns, until he or they shall be fully paid and satisfied, all such sums of money, costs, charges, damages, and expenses as aforesaid. [*Acknowledgment and undertaking as to the lease, and other documents of title, if required, ut ante*, p. 381 (*r*)].

In witness, &c.

The Schedule above referred to (*s*).

Acknowledgment and undertaking as to documents of title.

(*r*) On a sale of leaseholds in lots the conditions of sale usually provide that the custody of the lease and other documents relating to the whole of the property sold shall be delivered to the purchaser of a specified lot, or to the purchaser whose purchase-money is of the largest amount: see *ante*, Vol. II., p. 833, cl. 5. All the assignments, therefore, of the lots, other than the lot of the purchaser who retains the documents, should contain a statutory acknowledgment on the part of such purchaser for production and delivery of copies of the documents, and an undertaking by him for safe custody thereof. If the documents are retained by the vendor, either by reason of the specified lot being unsold or otherwise, an acknowledgment and undertaking will be given by him to the several purchasers.

Schedule.

(*s*) This schedule should contain a short description of each lot, the apportioned rents, names and addresses of purchasers and amounts of purchase-moneys, and may be in the following form :—

Schedule.

Number of Lot.	Description of Property.	Apportioned Yearly Rent.	Name and Address of Purchaser.	Amount of Purchase-money.

XCII. *ASSIGNMENT of* LEASEHOLDS *sold in* LOTS *to* ONE *of the* PURCHASERS, *to the intent that he may* GRANT UNDERLEASES *to the* OTHER PURCHASERS (*t*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS [*recite lease describing the parcels from the lease, and mesne assignments, if any, ut ante*, p. 390]: AND WHEREAS the said [*vendor*] has recently agreed with the said [*purchaser*] and the other persons whose names are mentioned in the [first] schedule hereunder written for the sale to them respectively of the messuages, lands, and premises comprised in the hereinbefore-recited indenture of lease in the lots, subject to the apportioned rents, and at the prices respectively mentioned in the same schedule: AND WHEREAS, upon the treaty for the said sales, it was agreed that the said [*purchaser*] should take an assignment of the said premises comprised in the said indenture of lease, and should

Conveyance of leasehold lots by assignment and underleases.

(*t*) The mode of conveyance on sale of leasehold lots given in the text of this and the next following Precedents obviates all the questions as to the insertion of powers of distress, considered in note (*o*) to the immediately preceding Precedent. A condition of sale providing for such mode of conveyance will be found *ante*, sub tit. CONDITIONS OF SALE, Vol. II., p. 826. The position of the purchaser taking the assignment of the lease (who is usually of the largest or of the most valuable lot) is not altogether satisfactory, inasmuch as he becomes liable for the whole rent reserved by the lease, and in respect of the covenants and conditions of the lease as regards the whole property therein comprised. Moreover, the other purchasers are strangers to him, in whose selection as his under-lessees he has had no voice; and he must either expressly covenant with the other purchasers for payment of the apportioned rent and performance of the covenants, &c., of the lease so far as regards his own lot, or (which is more usual and virtually amounts to the same thing) enter into the usual qualified lessor's covenant for quiet enjoyment without disturbance by himself or any person claiming under him. In order to protect him as far as possible the apportioned rents of other purchasers are reserved to him, and covenants on their part are inserted in the underleases for payment of their respective apportioned rents and performance of the covenants, &c., of the lease so far as relates to their respective lots; and a power of re-entry is very usually given to the assignee purchaser on breach of such covenants; but it seems that he cannot insist on the insertion of such a power in the underleases, unless its insertion is expressly provided for in the conditions of sale: see *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622.

XCII. Assignment of Leaseholds to Purchaser of Largest Lot, who is to Grant Underleases.

execute to the other purchasers such underleases as are hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the sum of £—— paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby assigns, and as beneficial owner conveys unto the said [*purchaser*], his executors and administrators, ALL THOSE the said messuages and pieces or parcels of land and premises comprised in and demised by the said indenture of lease, and particularly mentioned in the said [first] schedule hereunder written, TO HOLD all the premises hereby assigned UNTO the said [*purchaser*], his executors, administrators, and assigns, for the unexpired residue of the said term of —— years, at the rent reserved by and subject to the covenants on the part of the lessee and conditions contained in the said indenture of lease, and henceforth to be paid, performed, and observed, AS TO the premises comprised in lot 1 according to the description thereof contained in the said [first] schedule hereunder written, for the absolute use and benefit of the said [*purchaser*], his executors, administrators, and assigns; AND AS TO all the residue of the premises comprised in the said indenture of lease, other than the said premises so comprised in lot 1 as aforesaid, UPON TRUST at any time hereafter, upon the request of the said [*vendor*], his executors, administrators, or assigns, to make and execute unto and at the cost of the respective purchasers mentioned in the said [first] schedule hereunder written underleases of such parts of the premises comprised in the said indenture of lease as are comprised in the several lots set opposite to their respective names in the same schedule according to the description thereof respectively therein contained, to commence from the —— day of —— next, for the unexpired residue of the said term of —— years except the last day thereof, at the apportioned yearly rents respectively mentioned in the said [first] schedule hereunder written, and to commence respectively and be payable as from the said —— day of ——, such underleases to contain (*u*) all necessary covenants for payment of the said

Testatum.

Parcels.

Habendum.

As to lot 1 absolutely.

As to residue.

In trust to grant underleases.

(*u*) Sometimes a form of the intended underleases is annexed to the deed of assignment, in which case say here:—

"Such underleases to be according to the form of an under-

XCII. Assignment of Leaseholds to Purchaser of Largest Lot, who is to Grant Underleases.

apportioned rents mentioned in the same schedule respectively, and for the performance by the respective purchasers of the covenants on the part of the lessee and conditions contained in the said indenture of lease so far as such covenants and conditions relate to such parts of the premises comprised in the same lease as are purchased by the said purchasers respectively, and for indemnifying the said [*purchaser*], his heirs, executors, administrators, and assigns, against the non-payment of the said apportioned rents respectively, and the breach, non-performance, or non-observance of the covenants and conditions of the said indenture of lease in respect of the parts of the said premises purchased by the said purchasers respectively, and also a power of entry by the said [*purchaser*], his executors, administrators, and assigns, on non-payment of the said apportioned rents respectively, or on breach, non-performance, or non-observance of the covenants and conditions of the said indenture of lease, and all other necessary and proper covenants, powers, and provisions; AND in the meantime, and until such underleases shall be made and executed as aforesaid, UPON TRUST for the said [*vendor*], his executors, administrators, and assigns, subject nevertheless to the payment, performance, and observance by the said [*vendor*], his executors and administrators, of the apportioned rents, covenants, and conditions hereinafter mentioned, and covenanted to be paid, performed, and observed by him and them respectively; AND the said [*purchaser*], for himself and his assigns, hereby covenants with the said [*vendor*] that he, &c. [*covenant to pay the whole rent and perform the covenants of the lease, ut ante*, p. 392]: PROVIDED ALWAYS, and the said [*vendor*], for himself and his assigns, hereby covenants with the said [*purchaser*], that until all such underleases as aforesaid shall have been made and executed, he the said [*vendor*] will on demand pay to the said [*purchaser*], his executors, administrators, and assigns, all and every sums or sum of money which he or they shall pay under the covenant lastly hereinbefore contained in respect of any apportioned

And meanwhile in trust for vendor.

Covenants by purchaser.

Covenants by vendor to pay apportioned rents of other lots until under leases are granted.

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lease set out in the second [*or* third] schedule hereunder written, or as near thereto as the circumstances of each case will permit."

As to days of payment of apportioned rents, see *post*, p. 644, note (*a*).

XCII. Assignment of Leaseholds to Purchaser of Largest Lot, who is to Grant Underleases.

rents with relation to the premises hereby assigned (other than the premises so comprised in lot 1 as aforesaid), or such parts or part of the same premises whereof no underleases or underlease shall for the time being have been made and executed as aforesaid; AND will keep indemnified the said [*purchaser*], his heirs, executors, and administrators, against all actions, proceedings, costs, charges, damages, and expenses, for or in respect of all and any such apportioned rents as last aforesaid, and for or in respect of any breach, non-performance, or non-observance of any of the covenants on the part of the lessee, and conditions contained in the said indenture of lease so far as the same respectively relate to the premises hereby assigned (other than the premises so comprised in lot 1 as aforesaid), or such parts or part of the same premises whereof no underleases or underlease shall for the time being have been made and executed; AND the said [*purchaser*] hereby acknowledges the right of the said [*vendor*], until all such underleases as aforesaid shall have been made and executed, but not thereafter, to production of the said indenture of lease, [and the other documents specified in the second schedule hereunder written,] and to delivery of copies thereof, and he hereby undertakes for the custody in the meanwhile thereof.

And for indemnity.

Acknowledgment, &c., as to documents of title until all underleases are granted (*w*).

IN WITNESS, &c.

THE [FIRST] SCHEDULE ABOVE REFERRED TO.

[THE SECOND SCHEDULE ABOVE REFERRED TO] (*x*).

(*w*) See sect. 9, sub-sect. (13) of the Conveyancing and Real Property Act, 1881 (44 & 45 Vict. c. 41). If the vendor is the original lessee there will be no need for a second schedule.

(*x*) Add a third schedule, if required: see *ante*, p. 642, note (*u*).

XCIII. *UNDERLEASE on* SALE *of* LEASEHOLDS *to the* PURCHASER *of* ONE *of the* LOTS *by the* PURCHASER *of* ANOTHER LOT *who has taken an* ASSIGNMENT *of the* LEASE [*to accompany the last preceding Precedent* (*y*)].

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN [*assignee of lease*], of, &c., of the first part; [*vendor*], of, &c., of the second part; and [*purchaser taking underlease*], of, &c., of the third part: WHEREAS by an indenture

Recitals: of lease, &c.; of lease dated, &c., and made, &c., the messuage and hereditaments hereinafter described and hereby demised were, together with other hereditaments, demised unto, &c. [*continue recital of lease, and recite mesne assignments, if any, ut ante*, p. 391]; AND WHEREAS the said [*vendor*] has recently

of agreement for sale of lot to purchaser; agreed with the said [*purchaser*] for the sale to him of the said messuage and hereditaments hereinafter described at the

of agreement as to mode of conveyance; apportioned rent of £——; AND WHEREAS upon the treaty for the said sale it was arranged that the said [*assignee*] should take such an assignment from the said [*vendor*] of the whole of the premises comprised in the said indenture of lease as is hereinafter mentioned, and should make and execute to the said [*purchaser*] an underlease of the said messuage and hereditaments hereinafter described and hereby demised, being part of the said hereditaments comprised in the said indenture of lease and assignment respectively, at the said apportioned rent of £——, and subject to the covenants, conditions,

and custody of documents of common title; and provisions hereinafter contained; And it was then also agreed that the said [*assignee*] should be entitled to retain all documents relating to the common title of the said hereditaments demised by the said indenture of lease, and should give to the said [*purchaser*] such acknowledgment and undertaking in relation thereto as are hereinafter contained respectively:

of execution of assignment of lease. AND WHEREAS in pursuance of the said arrangement, by an indenture dated, &c., and made, &c., the whole of the said hereditaments comprised in the said indenture of lease have been assigned by the said vendor unto the said [*assignee*] for the unexpired residue of the said term of —— years thereby granted, at the rent and subject to the covenants on the part

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(*y*) See *ante*, p. 640, note (*t*). Counterparts of the several underleases should be delivered to the assignee purchaser.

XCIII. Underlease to Purchaser of a Leasehold Lot.

of the lessee and conditions thereby and therein reserved and contained, but upon trust, among other things, to make and execute to the said [*purchaser*] such underlease as aforesaid, being these presents. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum of £—— the said [*vendor*] hereby acknowledges the receipt, the said [*assignee*], by the direction of the said [*vendor*] (testified by his executing these presents), hereby demises, and the said [*vendor*] hereby confirms unto the said [*purchaser*], his executors, administrators, and assigns, All that messuage, &c. [*describe parcels*], being part of the said hereditaments comprised in the said indenture of lease, To HOLD the premises hereby demised UNTO the said [*purchaser*], his executors, administrators, and assigns, henceforth for all the unexpired residue of the said term of —— years granted by the said indenture of lease, except the last day thereof; YIELDING AND PAYING therefor unto the said [*assignee*], his executors, administrators, and assigns, yearly during the said term hereby granted, and so in proportion for any less time than a year, the rent of £—— without any deduction (except for property tax) by equal quarterly payments on the —— day of ——, &c. (*a*), in every year; the first payment

Testatum.

Demise (*z*).

Habendum: to purchaser for term of —— years less one day.

Reddendum: of apportioned rent.

(*z*) This, being a "demise by way of lease at a rent," is not a "conveyance" within the meaning of sect. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) so as to include therein, by the use of any of the expressions given in that section, any statutory covenants for title. It is therefore useless to make the vendor convey or direct as beneficial owner, or to make the assignee purchaser convey as trustee or otherwise: see sub-sect. (5) of that section. But by sub-sect. (6) of the same section (see *ante*, p. 229) the benefit of the vendor's covenants for title included in the assignment by his being therein expressed to convey as beneficial owner will enure for the benefit of and be capable of being enforced by the several under-lessees in whom the estate or interest of the assignee purchaser is, for a part thereof, vested. The assignee purchaser's covenant for quiet enjoyment will be, so far as the acts of himself and those claiming under him are concerned, a sufficient protection to the under-lessees; indeed, such covenant may subject the assignee purchaser to serious liabilities.

As to statutory covenants for title.

(*a*) The apportioned rents should be made payable half-yearly or quarterly as in the lease, and it will be well that the dates fixed for payment should be one or more days before the dates fixed by the lease.

XCIII. Underlease to Purchaser of a Leasehold Lot.

thereof to be made on the 25th day of March, 18—: And the said [*purchaser*] hereby for himself and his assigns covenants with the said [*assignee*] that he the said [*purchaser*], his executors, administrators, or assigns, will henceforth pay the said rent of £—— hereby reserved at the times and in manner hereinbefore appointed for payment thereof, and will perform and observe all the covenants by the lessee (except the covenant for payment of rent) and conditions contained in the said indenture of lease, so far as the same respectively relate to the said premises hereby demised, and will keep indemnified the said [*assignee*], his executors, administrators, and assigns, against all actions, distresses, proceedings, costs, claims, damages, expenses, claims and demands for breach, non-performance, or non-observance of the said covenants or any of them: Provided always that if the said rent of £—— hereby reserved, or any part thereof, shall remain unpaid for 21 days after the same ought to be paid as aforesaid, whether any formal or legal demand thereof shall have been made or not, or if any of the covenants and agreements herein contained on the part of the said [*purchaser*], his executors, administrators, and assigns, shall not be by him or them performed and observed, then and in any such case it shall be lawful for the said [*assignee*], his executors, administrators, and assigns, into and upon the premises hereby demised, or any part thereof, in the name of the whole, to re-enter and the same to have again and enjoy as if this had never been made, but without prejudice to any right of action or remedy of the said [*assignee*], his executors, administrators, or assigns, in respect of any previous breach of any covenant on the part of the said [*purchaser*], his executors, administrators, and assigns herein contained. And the said [*assignee*] hereby covenants with the said [*purchaser*] that he paying the said rent of £—— hereby reserved in manner aforesaid, and observing and performing all and singular the covenants, conditions, and agreements on his and their part to be performed and observed, shall and may peaceably and quietly hold and enjoy the premises hereby demised during the said term hereby granted, without any

Covenants by purchaser of lot for payment of apportioned rent, and performance of covenants, &c., of lease.

Power of entry (*b*).

Covenant for quiet enjoyment.

(*b*) As to powers of re-entry for non-payment of rent, see *ante*, sub tit. Leases, Vol. III., pp. 250 *et seq.*

interruption or disturbance of or by the said [*assignee*], his executors, administrators or assigns, or any persons or person whomsoever claiming under or in trust for him or them [*acknowledgment and undertaking by the assignee as to documents of title, ut ante*, p. 381, *mutatis mutandis*].

XCIII. **Underlease to Purchaser of a Leasehold Lot.**

Acknowledgment, &c. (*c*).

In witness, &c.

The Schedule above referred to.

XCIV. *CONVEYANCE by* Ecclesiastical Commissioners *of Land and the Tithe Rentcharge thereon.*

THIS INDENTURE, made the —— day of ——, 18—, Between the Ecclesiastical Commissioners of England and Wales (hereinafter referred to as the Commissioners) of the one part, and [*purchaser*] of, &c., of the other part: Whereas on the vacancy of the Bishopric of —— occurring on or about the —— day of ——, 18—, by the decease of the Right Reverend [A.B.], late Bishop of ——, the lands, tithes, rentcharges, and hereditaments hereby granted as part of the hereditaments and emoluments of the said Bishop, by virtue of the Act of Parliament in that behalf, became vested in the Commissioners, subject, with other hereditaments of greater value, to the annual sum of 50*l.*, payable thereout to the vicar for the time being of the church of ——, in the same county, in pursuance of certain directions of His late Majesty King Charles the Second; And also subject to the annual sum of 100*l.*, payable thereout to the rector for the time being of the rectory of ——, in the county of ——, duly charged thereon in pursuance of the Acts passed in the first and second years of His late Majesty King William the Fourth, cap. 45, and the same lands, tithes, rentcharges, and hereditaments are now vested in the Commissioners in possession

Parties.

Recitals: of title of Commissioners;

(*c*) This acknowledgment, &c., should include the lease and the assignment thereof, and also any mesne assignments thereof by reference to a schedule. If there are no mesne assignments no schedule will be required.

XCIV. **Conveyance by Ecclesiastical Commissioners of Land and Tithe Rentcharge.**

subject as aforesaid: AND WHEREAS by virtue of the several Acts of Parliament relating to the said Commissioners, and of an order of Her Majesty in Council, dated the —— day of ——, 18—, and duly published in the London Gazette on the —— of the same month, ratifying a scheme of the Commissioners therein recited or referred to, the Commissioners were authorized to sell and convey all or any of the said lands, tithes, rentcharges, and hereditaments theretofore belonging to the said Bishopric of —— so vested in them as aforesaid, with their appurtenances and all the estate and interest of the Commissioners, or any part or parts thereof, for such consideration as should upon due calculation and inquiry appear to the Commissioners to be just and reasonable: AND WHEREAS the said [*purchaser*] has agreed with the said Commissioners for the purchase, in pursuance of the said recited scheme and order in council, of the said lands, tithes, rentcharges, and hereditaments thereby granted, and the timber and trees standing thereon, for the sum of £—— (being the consideration which, upon due calculation and inquiry, appeared to the Commissioners to be just and reasonable, freed and discharged as between the Commissioners, their successors and assigns, and the purchaser, his heirs and assigns, from the said annual sums of 50*l.* and 100*l.* charged thereon as aforesaid, but subject as hereinafter expressed; And it was agreed between the said parties that such annual sums of 50*l.* and 100*l.* respectively should be henceforth paid by the Commissioners, their successors and assigns, in exoneration of the said hereditaments agreed to be sold as aforesaid: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the account of the Commissioners at the Bank of England (the receipt of which said sum is acknowledged by a memorandum endorsed on the now recited indenture and signed by two of the Commissioners, and the payment whereof the Commissioners do also hereby acknowledge), the Commissioners, by virtue and in exercise of the powers in this behalf given to or vested in them by the hereinbefore recited order in council and of all powers and authorities in anywise them hereunto enabling, hereby grant and convey unto the said [*purchaser*] and his heirs: FIRST, ALL THOSE pieces or parcels of land situate, lying, and

of scheme for sale;

of agreement for sale.

Testatum.

Conveyance by Commissioners.

Parcels:

XCIV. Conveyance by Ecclesiastical Commissioners of Land and Tithe Rentcharge.

being in the parish of ——, in the county of ——, containing together by admeasurement a.— r.— p.—, be the same more or less, as the same are now more particularly described in the schedule hereunder written and delineated in the plan drawn in the margin of these presents and thereon coloured ——; AND SECONDLY, ALL THAT annual sum of rentcharge in lieu of tithes, now amounting to the sum of £——, but variable according to the provisions contained in the several Acts of Parliament relating to the commutation of tithes, and arising and payable out of the said lands described in the said schedule hereto, and as the same are now set out and described in the schedule to the confirmed apportionment of tithes in the said parish of ——, and are also set out and described in the said schedule hereto; Together with all powers, rights, and remedies for the recovery of the said rentcharge: TO HOLD the said premises hereby granted UNTO the said [*purchaser*] and his heirs, freed and discharged, as between the Commissioners, their successors and assigns, and the said [*purchaser*], his heirs and assigns, from the said annual sums of 50*l.* and 100*l.* respectively, and every part hereof respectively, but subject to all rights of way and easements, if any, affecting the same, and subject and charged with all vicarial tithes or rentcharge, if any, payable in lieu hereof, and all rates, taxes, &c., affecting the same respectively, other than those payable to or on behalf of the Commissioners in respect of the said premises, TO THE USE of the said [*purchaser*], his heirs and assigns: AND the said Commissioners hereby covenant with the said [*purchaser*] that they have not done, omitted, or knowingly suffered anything whereby the said premises are or may be impeached, affected, or incumbered in title, estate, or otherwise howsoever.

several parcels of land;

and tithe rentcharge.

Habendum.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XCV. *CONVEYANCE in* FEE *on* SALE *of Glebe Land by a* RECTOR *with the* CONSENT *of the* PATRON *of the Benefice, and of the* ECCLESIASTICAL COMMISSIONERS (*d*).

THIS INDENTURE, made the —— day of ——, 18—,

Parties. BETWEEN the Reverend [*rector*], clerk in holy orders, rector of the parish church of ——, in the county of ——, of the first part; [*patron*], of, &c., the present patron of the said rectory, of the second part; the Ecclesiastical Commissioners for England and Wales (hereinafter called the Commissioners) of the third part; and [*purchaser*], of, &c., of the fourth part:

Recitals: that lands form part of glebe; WHEREAS the lands and hereditaments hereinafter described and hereby conveyed form part of the glebe lands belonging to the said rectory:

of agreement for sale; AND WHEREAS the said [*rector*] recently agreed with the said [*purchaser*] for the sale to him, subject to the approval of the Commissioners being obtained, of the said lands and hereditaments in fee simple, free from incumbrances, for the price of £——:

of notice to bishop of intended sale; AND WHEREAS notice of the intended sale was on the —— day of ——, 18—, duly given to the Right Reverend [*bishop*] Lord Bishop of ——, pursuant to the provisions in that behalf contained in the Ecclesiastical Leasing Act, 1858:

of agreement of patron and com- AND WHEREAS the said [*patron*] and the Commissioners, being satisfied that the said intended sale will be to the per-

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Sale of glebe. (*d*) By the Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), certain powers of leasing are given to ecclesiastical corporations, aggregate and sole, with the consent of the Ecclesiastical Commissioners: see as to these powers, *ante*, sub tit. LEASES, Vol. III., p. 57. By the Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), sect. 1, it is enacted that lands authorised to be leased by the Act of 1842, or any part thereof, may be sold by the incumbents or other ecclesiastical corporations to whom they belong, with the consent of the Commissioners, "Provided always that no such sale by the incumbent of a benefice shall be authorised by the said Commissioners, unless three months' notice in writing of such proposed sale shall have been given to the bishop of the diocese in which the benefice is situate." By sect. 2 of the same Act, the purchase-money upon any such sale is to be paid to the Commissioners. And by the stat. 29 & 30 Vict. c. 111, sect. 3, the three Church Estates Commissioners are to be joint treasurers of the Ecclesiastical Commissioners, and the receipt of any two of such treasurers, or any one of them, and of the accountant or assistant accountant of the Ecclesiastical Commissioners, is to be a good discharge to a purchaser.

XCV. Conveyance of Glebe Lands.

manent advantage of the said rectory and the incumbent thereof for the time being have respectively agreed to concur in these presents in manner and for the purposes hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, for effectuating the sale, and in consideration of the sum of £—— now paid by the said purchaser, by the direction of the Commissioners, to their account at the Bank of England, the payment of which sum of £—— is intended to be acknowledged by a memorandum endorsed on these presents, and the payment whereof the Commissioners hereby acknowledge, the said [*rector*], with the consent as well of the said [*patron*], testified by his execution of these presents, as also of the Commissioners, testified by their common seal affixed hereto, doth hereby, in pursuance of the power or authority in this behalf given to him by the Ecclesiastical Leasing Acts, and of every other power or authority him hereunto enabling, grant [and as beneficial owner convey (*e*)] unto the said [*purchaser*], and his heirs ALL THOSE closes or parcels of land, &c. [*describe parcels*], TO HOLD all the premises unto and to the use of the said purchaser, his heirs and assigns. [AND the said [*rector*] hereby covenants with the said [*purchaser*] that he the said [*rector*] has not, &c. [*covenant against incumbrances, ut ante, p.* 419] (*e*).]

Commissioners to concur in conveyance.

Testatum.

Habendum.

(*e*) Incumbents selling glebe lands do not usually enter into covenants for title, and as they are not trustees it seems that they should give express covenants against incumbrances.

XCVI. *CONVEYANCE in fee to* TRUSTEES *in trust for* PIOUS *or* CHARITABLE PURPOSES *in Parish, under direction of Rector and Churchwardens for time being* (*f*).

Parties. THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*trustee*], of, &c., and [*trustee*], of, &c., of the other part: WHEREAS

Recital of agreement for purchase. the said [*trustees*] have agreed to purchase the hereditaments hereinafter described to the intent that the same may hereafter be used for the charitable purposes hereinafter expressed: NOW

Testatum. THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*trustees*] to the said [*vendor*] (the receipt of which sum the said [*vendor*] hereby acknowledges),

Conveyance. the said [*vendor*] hereby grants, and as beneficial owner conveys unto the said [*trustees*] and their heirs, ALL, &c.

Parcels. [*describe parcels*], TO HOLD all the premises UNTO AND TO THE

Habendum. USE of the said [*trustees*], their heirs and assigns, to the intent that the said [*trustees*], their heirs and assigns, shall for ever hereafter stand seised of the premises hereby conveyed, UPON TRUST from time to time to use and dispose thereof, and of every part thereof in such manner as from time to time the rector and churchwardens for the time being of the parish church of ——, in the county of ——, shall direct, so as that such directions shall be for the use of the purposes, or some one or more of the purposes following, that is to say: FIRST, in whole or in part, as a residence for the sexton, clerk, organist, curate, or any other officer, or of a person employed in the services of the said parish church, for the time being;

Conveyance of land for parochial purposes. (*f*) A conveyance for parochial purposes may, if desired, be made to the churchwardens and overseers of the parish: see *ante*, sub tit. MORTMAIN, Vol. IV., p. 53.

Enrolment. This conveyance being for valuable consideration seems not to be within the Mortmain Acts, so far as regards the mode of execution and the avoidance of the deed upon the death of the partner within twelve months after the execution of the conveyance: see 9 Geo. 2, c. 36, sect. 2; *ante*, sub tit. MORTMAIN, Vol. IV., p. 3; but it is conceived that it must be enrolled within six calendar months after execution, unless the charitable uses are declared by deed (a proceeding which is not here contemplated), in which event the declaratory deed must be enrolled: see Vol. IV., p. 5, and see p. 6.

XCVI. Conveyance in Fee to Rector for Parochial Purposes.

or SECONDLY, by way of addition to the churchyard, to the intent that the same may be consecrated for the purposes to which the churchyard of the said parish church is already applicable; or THIRDLY, in any other manner which may, in the judgment of the said rector and churchwardens for the time being, be useful for any pious or charitable purposes, for the benefit of the inhabitants of the said parish of ——, or of some of them, and approved of by the said rector and churchwardens for the time being; AND IT IS HEREBY DECLARED that the power of appointing a new trustee or new trustees of these presents shall from time to time be exerciseable by the rector and churchwardens for the time being of the said parish of ——.

IN WITNESS, &c.

XCVII. *GRANT of an* ADVOWSON, *in* CONSIDERATION *of the Purchaser paying the same* ANNUITY *as the* VENDOR *had* COVENANTED *to* PAY *when he purchased it; with a* COVENANT *by the* PURCHASER *to* PAY *the* ANNUITY *and* INDEMNIFY. (*Variation where Purchaser gives a* BOND OF INDEMNITY.)

THIS INDENTURE (*g*), made the —— day of ——, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS, by an indenture bearing date on or about the —— day of ——, and made between [A. B.], of the one part, and the said [*vendor*], of the other part, in consideration of the bond of the said [*vendor*], bearing even date with the indenture now in recital, in the penalty of £——, conditioned for the payment unto the said [A. B.] and

Parties.

Recitals: of grant to vendor;

(*g*) Stamp, 10*s*. As no pecuniary consideration passes from the purchaser to the vendor, this deed is not subject to any *ad valorem* stamp.

Stamp.

The subject of advowsons as regards their nature and incidents, and the mode of alienation thereof, is fully discussed, *ante*, Vol. I., pp. 459, *et seq.*, in notes.

Nature, &c., of advowson.

XCVII. Advowson in Fee.

his assigns, for his life, of an annuity of £——, clear of all deductions, at the times and in manner therein mentioned; (and which bond, and the annuity thereby secured, are expressed to be in full for the absolute purchase of the advowson and hereditaments therein and hereinafter mentioned, and of the fee-simple and inheritance thereof, with the appurtenances, free from incumbrances), All that the advowson and perpetual right of patronage and presentation of and to the rectory or parish church of [R.], in the county of ——, with all and every the rights, members, and appurtenances whatsoever to the same belonging or in anywise appertaining, were assured to the use of the said [*vendor*], his heirs and assigns, free from incumbrances: AND WHEREAS the said [A. B.] afterwards obtained her Majesty's licence and consent to use the surname and bear the arms of [C.], instead of the surname and arms of [B.]: AND WHEREAS the said [*vendor*] has agreed to assure the said advowson and hereditaments unto the said [*purchaser*], his heirs and assigns, in manner hereinafter appearing, in consideration of the (*h*) covenant hereinafter contained on the part of the said [*purchaser*] for payment of the said annuity of £——, so secured to the said [A. C.] during his life as aforesaid, and for the indemnity of the said [*vendor*], as hereinafter mentioned. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the (*i*) covenant hereinafter contained on the part of the said [*purchaser*], his heirs, executors, and administrators, for payment of the aforesaid annuity of £——, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, the said [*vendor*] hereby grants and, as beneficial owner, conveys unto the said [*purchaser*], his heirs

of annuitant having changed his name;

of agreement to purchase.

Testatum.

Grant.

(*h*) If the purchaser gives a bond for payment of the annuity the subsequent part of the recital will be varied thus:—

Variation where the purchaser gives a bond of indemnity.

"bond of the said [*purchaser*] hereinafter referred to, conditioned for the payment," &c.

(*i*) "bond of the said [*purchaser*], bearing even date with these presents, in the penalty of £——, conditioned for the payment of the aforesaid annuity, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, therefrom, in the manner in the condition of the said bond expressed," &c.

and assigns, ALL THAT the advowson and perpetual right of patronage and presentation of and to the rectory or parish church of [R.], in the said county of ——: TO HOLD the said advowson, hereditaments, and premises, UNTO AND TO THE USE of the said [*purchaser*], his heirs and assigns. AND THIS INDENTURE FURTHER WITNESSETH (*k*), that, in consideration of the grant hereinbefore made of the said advowson and premises, the said [*purchaser*] hereby covenants with the said [*vendor*], that he the said [*purchaser*], his heirs, executors, or administrators, will henceforth during the life of the said [A. C.], pay unto the said [A. C.] and his assigns, the said annuity or yearly sum of £——, secured to him and them by the bond hereinbefore mentioned or referred to, dated the —— day of ——, when and as the same annuity shall henceforth become due and payable; And also will at all times hereafter, keep indemnified the said [*vendor*], his heirs, executors, and administrators, from and against all actions, proceedings, costs, charges, expenses, claims, and demands, by reason or on account of the non-payment of the said annuity or yearly sum of £——, by the said [*purchaser*], his heirs, executors, or administrators, pursuant to the covenant of the said [*purchaser*] hereinbefore contained.

IN WITNESS, &c.

XCVII. **Advowson in Fee.**

Parcels.

Advowson.

Habendum.

Further *testatum.*

Covenant by purchaser to pay the annuity;

and indemnify vendor.

XCVIII. *GRANT of the* NEXT PRESENTATION *to a* RECTORY *in* CONSIDERATION *of a* GROSS SUM.

THIS INDENTURE (*l*), made the —— day of ——, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS the said [*vendor*] is seised of the perpetual advowson, right of patronage and

Parties.

Recitals: of seisin;

(*k*) If a bond is given by the purchaser, of course this *testatum* clause will be omitted. The convenience attending a bond is that it is delivered to the obligee, whereas the covenant, being contained in the grant, passes into the hands of the covenantor.

(*l*) This deed of course will bear an *ad valorem* stamp, as in the instance of the transfer of any other species of property. Stamp.

XCVIII. **Grant of next Presentation.**

of contract. presentation of and to the rectory or parish church of ——, and the inheritance thereof in fee simple, free from incumbrances, of which rectory or parsonage the Reverend [A. B.] is the present incumbent: AND WHEREAS the said [*vendor*] has agreed to sell to the said [*purchaser*], his executors, administrators, and assigns, the next turn or presentation to the said rectory or parsonage, when the same shall first and next happen to become vacant, for the sum of £——: NOW

Testatum. THIS INDENTURE WITNESSETH, that in pursuance of

Consideration. the said contract, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [*vendor*], of which sum the said [*vendor*] hereby acknowledges the

Grant. receipt, he the said [*vendor*] hereby grants, and as beneficial owner conveys unto the said [*purchaser*], his executors, ad-

Parcels. ministrators, and assigns (*m*), ALL THAT the first and next

Next presentation. nomination and turn or right of presentation, of and to the rectory and parish church of —— aforesaid, which shall happen or arise upon or in consequence of the vacancy or avoidance of such rectory or living, by death, resignation, cession, or deprivation, or by whatsoever other ways or means the said church shall first or next happen to be void; TO HOLD the premises UNTO the said [*purchaser*], his executors, administrators, and assigns [*acknowledgment and undertaking by vendor as to muniments of title*].

IN WITNESS, &c.

(*m*) A next presentation, when sold apart from the advowson, is personal property: *Bennett* v. *Bishop of Lincoln*, L. R. 10 C. P. 518.

XCIX. *GRANT of* Impropriate Commutation Tithe-Rentcharge *of specific Lands to the* Owner *of the* Lands, *in order that it may merge. Proviso as to Land-tax, &c.* (*n*).

THIS INDENTURE, made the —— day of ——, Between [*vendor*], of, &c., of the one part; and [*purchaser*], of, &c., of the other part: Whereas the said [*vendor*] is seised in fee simple, free from incumbrances, of the impropriate tithe-rentcharge, hereinafter expressed to be hereby granted, of and in the lands and hereditaments described in the schedule hereunder written, of which hereditaments the said [*purchaser*] is now seised in fee simple in possession, and has agreed to sell the said tithe-rentcharge to the said purchaser for the price of £——; and it has been agreed, that the same tithes and portions of tithes shall be granted and conveyed unto the said [*purchaser*], and his heirs, free from all incumbrances, except a proportionate part of the land-tax and other taxes, rates and assessments for or in respect of the said rectory or parsonage, and hereditaments, to the intent that the same may be absolutely merged in the said lands and hereditaments. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid by the said [*purchaser*] to the said [*vendor*], of which sum the said [*vendor*] hereby acknowledges the receipt, the said [*vendor*] hereby grants and, as beneficial owner, conveys unto the said [*purchaser*] and his heirs, All that the impropriate tithe-rentcharge now commuted at and amounting to £——, but variable according to the provisions of the several Acts of Parliament relating to the commutation of tithe-rentcharge, and to the said rectory or parsonage belonging or appertaining, and issuing and arising out of or in respect of All [*parcels by reference to schedule*]; Together with all powers, rights,

Parties.

Recital of title to impropriate tithe rent-charge and of contract for purchase.

Testatum.

Grant of tithe-rent-charge in particular lands.

(*n*) Tithe or tithe rent-charge is real estate under the stat. 32 Hen. 8, c. 7: see *Doe* d. *Lushington* v. *Bishop of Llandaff*, 2 N. R. 491. Tithe is distinct from the land, and will not pass by a conveyance of the land, unless expressly mentioned and conveyed therewith; and accordingly it will not (irrespectively of the statutory enactments in that behalf) merge in the land if the ownership of the tithe and land become united in the same person: see *Chapman* v. *Gatcombe*, 2 New Ca. 516; and see Williams' R. P. 361.

Nature of tithe rent-charge.

XCIX. Grant of Tithe Rentcharge to Merge.

and remedies for the recovery of the said tithe-rentcharge (*o*), To HOLD the said tithe-rentcharge and premises UNTO AND TO THE USE OF the said [*purchaser*], his heirs and assigns, to the intent that the said tithe-rentcharge and premises hereby granted shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands and hereditaments of the said [*purchaser*], according to the provisions of the Act of Parliament in that behalf made and provided. PROVIDED ALWAYS, and it is hereby agreed and declared, and the said [*purchaser*] hereby covenants with the [*vendor*], that while and so long as the said rectory and parsonage, or the owner thereof in respect thereof, shall be assessed or rated to the land-tax, poor's rates, church rates, or any other parliamentary or parochial charge, tax, or assessment, upon a rating or assessment, including the tithe-rentcharge and hereditaments hereby granted, then and during such assessment or rating, and so long as the same shall continue, the said [*purchaser*], his heirs or assigns, will pay and contribute to the said [*vendor*], his heirs or assigns, such part of the said several taxes, rates, charges, and assessments respectively, as would be payable in respect of the said tithes and hereditaments hereby granted if rated or assessed alone, upon, or in proportion to the ratings or assessments following: (that is to say), —*s.* per annum for land-tax, a rating towards the poor's rates upon, &c., a rating towards the church rates upon, &c.; The present ratings or assessments in respect of the whole of the said rectory or parsonage, including the tithes and hereditaments hereby granted, being £—— per annum for land-tax, a rating towards the poor's

Habendum to merge.

Proviso that purchaser shall pay his proportion of land-tax, &c.

Distress.

(*o*) Powers for the recovery by distress of tithe rent-charge if in arrear for 21 days are given by sect. 81 of the stat. 6 & 7 Will. 4, c. 71; see also 23 & 24 Vict. c. 93, sects. 29, 30. If the rent-charge be in arrear for 40 days and there be no sufficient distress on the premises, the remedy of the owner of the rent-charge is by suing out execution for taking possession of the land, and perception of the rents and profits till the amount due and costs are satisfied: 6 & 7 Will. 4, c. 71, sect. 82; see sect. 85; see also *Re Hammersmith Rent-charge*, 4 Exch. 87; *Ex parte Arnison*, L. R. 3 Ex. 56. The distress and execution extend only to two years' arrears. See further as to arrears of tithes or tithe rent-charge the stats. 53 Geo. 3, c. 127, sect. 5; 2 & 3 Will. 4, c. 100; 3 & 4 Will. 4, c. 27, sect. 42; 4 & 5 Will. 4, c. 83; see also *Saikeld* v. *Johnston*, 1 Mac. & G. 242; *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459; *Bailey* v. *Badham*, 30 Ch. D. 84.

rates upon, &c. PROVIDED ALWAYS, and it is hereby declared and agreed, that either of the said parties hereto, his heirs or assigns, shall be at liberty to require and procure the said tithes and hereditaments hereby granted, or the said lands and hereditaments wherein the same are hereby merged in respect thereof, to be rated or assessed to all or any of the said taxes, rates, charges, and assessments, separately and apart from the said rectory or parsonage (*p*).

XCIX. **Grant of Tithe Rentcharge to Merge.**

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

(*p*) This deed, so far as concerns the merger of the tithe rent-charge, must be confirmed under the seal of the Tithe Commissioners. The stat. 6 & 7 Will. 4, c. 71, sect. 71, after enacting that no rent-charge in lieu of tithes, "shall merge or be extinguished in any estate of which the person for the time being entitled to such rent-charge may be seised or possessed in the lands on which the same shall be charged," provides, "That it shall be lawful for any person seised in possession of an estate in fee-simple or fee-tail, of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said Commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged." Sect. 86 of the same Act contains provisions as to the apportionment of tithe rent-charge in respect of time: see also *Heasman* v. *Pearse*, L. R. 8 Eq. 599.

As to merger of tithes or commutation rent, stat. 6 & 7 Will. 4, c. 71, s. 71.

Tenant in tail or fee-simple may cause tithes or rents to merge.

The stat. 7 Will. 4 & 1 Vict. c. 69, sect. 12, enacts, "That no deed or declaration authorized by the said Act for the commutation, release, or merger of tithes shall be chargeable with any stamp duty." This probably would be construed to mean so far only as the deed is confined to the object of merger, and to have contemplated the case where the owner of the tithes, being also owner of the land, declares that the former shall merge. The precedent in the text is a purchase-deed, upon which it is presumed the *ad valorem* duty would be payable. This construction, however, reduces the word "release" in the Act to insignificancy: see 1 & 2 Vict. c. 64, sect. 2, *infra*.

7 Will. 4 & 1 Vict. c. 69, s. 12.

Deeds exempt from stamp duty.

By the stat. 1 & 2 Vict. c. 64, "An Act to Facilitate the Merger of Tithes in Land," after reciting the former Act, it is enacted, "That after the passing of this Act it shall be lawful for any person or persons who shall either alone or together be seised of, or have the power of acquiring or disposing of, the fee-simple in possession of any tithes, or rent-charge in lieu of tithes, by any deed or declaration under his or their hand and seal, or hands and seals, to be made in such form as the Tithe Commissioners for England and Wales shall approve, and to be confirmed under their seal, to convey, appoint, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the free-

1 & 2 Vict. c. 64.

Persons having power over the fee-simple of tithes or rent may merge them.

XCIX. Grant of Tithe Rentcharge to Merge.

1 & 2 Vict. c. 64.

hold and inheritance of the lands out of or on which the same shall have been issuing or charged. And every such deed or declaration as aforesaid shall be valid and effectual for the purpose aforesaid, although the same may not be executed or made in the manner or with the formalities or requisites which, if this Act had not been passed, would have been essential to the validity of any instrument by which such person or persons could have acquired or disposed of the fee-simple in possession of such tithes, or rent-charge in lieu of tithes."

Deeds not chargeable with duty.

Sect. 2 enacts that no deed or declaration authorized by this Act for the merging of tithes shall be chargeable with any stamp duty. By sect. 3, where tithes or rent-charge of the lands charged are settled to same uses, tenant for life may merge them. And by sect. 4 tithes or rent-charge may be merged in copyhold lands.

Stat. 2 & 3 Vict. c. 62.

Charges on tithes merged.

By the stat. 2 & 3 Vict. c. 62, sect. 1, it is provided that charges on tithes which have been merged shall be charges upon the lands in priority to any other charge on the lands. Sect. 2 authorizes the party effecting the merger, with the consent of the Tithe Commissioners, to apportion the charge on a specific part of the lands, or on other lands belonging to him in the same parish, being in the opinion of the Commissioners of at least three times the value of the charge. Sect. 6 extends the provisions of the former Acts as to merger, to cases where the tithe or rent-charge and the land (whether glebe land or not) both "belong to the same person in virtue of his benefice, or of any dignity, office, or appointment, held by him." By sect. 7, in cases of merger of tithes or rent issuing out of copyholds subject to arbitrary fine, the Commissioners are to indorse on the deed of merger a certificate under their hands and seal of the annual value of the tithes or rent-charge so merged, to be ascertained by them by such means as they shall think fit, and all future assessments of fines on the land are to be made as if they were still subject to the tithes or rent-charge; "and the production of such deed, declaration, or instrument of merger, or of a duplicate thereof with such certificate endorsed, or of an office copy of such deed, declaration, or instrument and certificate endorsed thereon, shall be sufficient evidence of the annual value of such tithes or rent-charge."

Merger of tithes in glebe lands, &c.

Arbitrary fines on copyholds after merger of tithes.

The following form of declaration merging tithes by a separate instrument, under the 6 & 7 Will. 4, c. 71, was issued by the Commissioners:—

Form of declaration merging tithes.

"KNOW ALL MEN by these presents, I ——, of, &c., being lawfully seised of an estate in possession in fee simple (*or*, in fee tail) in the tithes (*or*, rent-charge, *if the declaration is made after an agreement for a rent-charge*) issuing from or arising upon (*or*, charged upon, *if it be a rent-charge*) the lands hereinafter described, situate in the parish of ——, in the county of ——, that is to say [*here describe the lands fully and accurately*], Do hereby declare it to be my will and intent, that the said tithes (*or*, rent-charge) shall henceforth

C. *ASSIGNMENT of* Redeemed Land-Tax. Variations *where the* Grant *is of a* Fee-Farm Rent *in lieu of Land-Tax.*

THIS INDENTURE, made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one part; and [*purchaser*], of, &c., of the other part: Whereas by a certificate of contract under the hands and seals of [*commissioners*] (two of the commissioners acting under the several Acts for the redemption of the land-tax), dated the —— day of ——, and registered on the —— day of ——, the sum of £—— land-tax, being the land-tax charged upon the hereditaments hereinafter mentioned in the proportions following, namely [*transcribe the extract from the assessment*], was redeemed by [*former owner*]; And whereas by virtue of various assurances and Acts in the law, and ultimately by an indenture dated, &c., and made, &c. (*r*), All that the aforesaid land-tax or several

Parties.

Recitals: of redemption of land-tax (*q*);

of mesne assignments, and ultimate assignment to the vendor;

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be absolutely merged and extinguished in the freehold and inheritance of the said lands, according to the provision in that behalf contained in a statute made in the reign of his Majesty King William the Fourth, intituled 'An Act for the commutation of tithes in England and Wales;' In testimony whereof I have hereunto subscribed my name, and affixed my seal this —— day of ——."

The Commissioners recommend that, where, at the time of the commutation, the rent-charge is intended to be merged, in order to save expense, and for the better preservation of the evidence of the merger, the declaration should be inserted into the agreement for commutation itself.

The other Acts relating to tithe rent-charge and the merger or redemption thereof are the stats. 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 93; 23 & 24 Vict. c. 93; and 41 & 42 Vict. c. 42.

(*q*) A contract for the purchase of a fee-farm rent may be thus recited:—

"Whereas by a certificate of contract under the hands and seals of [*commissioners*] (two of the commissioners acting under the several Acts for the redemption and sale of the land-tax), dated, &c., and registered, &c., the fee-farm rent of £——, to be paid in lieu of land-tax out of [*premises charged*], was sold to [*original purchaser*]."

of purchase of rent in lieu of land-tax;

(*r*) "All that the aforesaid fee-farm rent of £—— so purchased by the said, &c., and all future payments thereof,

Fee-farm rent.

C. Assignment of Land-tax.

yearly sums of 1*l.* 18*s.* 9*d.*, &c., amounting together to £——, so redeemed by the said [*former owner*], as mentioned and specified in the said certificate of contract, and all future payments of the said several sums respectively were assigned unto the said [*vendor*], his executors, administrators, and assigns (*s*); And whereas the said [*vendor*] has, since the date of the said indenture, been in the possession or receipt of the said (*t*) redeemed land-tax or several yearly sums, and the same have been paid to or received by him up to and inclusive of the 24th day of June last; And whereas the said [*vendor*] has agreed with the said [*purchaser*] for the sale to him of the said (*u*) land-tax for the price of £——. NOW THIS INDENTURE WITNESSETH that, in consideration of £—— (*w*) now paid by the said [*purchaser*] to the said [*vendor*], the receipt whereof is hereby acknowledged, the said [*vendor*] hereby assigns (*x*) and, as beneficial owner,

of enjoyment by vendor, and contract for sale.

Testatum.

Vendor assigns land-tax.

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were granted and assured unto the said [*vendor*], his heirs and assigns."

Devolution of purchased land-tax and fee-farm rent respectively.

(*s*) Many assignments of redeemed land-tax, with the limitation to the heirs, are to be met with, the framers of them having apparently been in doubt as to the course in which the property would devolve. Land-tax redeemed under the stat. 38 Geo. 3, c. 60, goes to the personal representatives: a fee-farm rent, purchased under the stat. 42 Geo. 3, c. 116, goes to the heirs. But where a tenant for life, or for any other particular interest, redeems the land-tax out of his own pocket, the charge to which he is entitled under that Act is personal estate (s. 123), and, without some evidence of intention, will not merge upon his becoming entitled to the fee-simple: *Trevor* v. *Trevor*, 2 Myl. & K. 675; see *Weld* v. *Tew*, Beatt. 275; *Ex parte Phillips*, 19 Ves. 118; *Ex parte Sparkes*, M'Clel. 518.

(*t*) "fee-farm rent, and the same has been," &c.

(*u*) "yearly fee-farm rent."

Stamp.

(*w*) The deed will require the usual *ad valorem* stamp. The exemption in the stat. 42 Geo. 3, c. 116, sect. 173, only applies to assignments for special purposes under the provisions of the Land-tax Acts: see 45 Geo. 3, c. 77; 55 Geo. 3, c. 184, Sched. Part I., "Land-tax."

Grant of fee-farm rent.

(*x*) "grants and, as beneficial owner, conveys unto the said [*purchaser*] and his heirs All that the said yearly fee-farm rent or sum of £—— so as aforesaid purchased by the said [*original purchaser*], and issuing and henceforth to be paid and borne out of the said several hereditaments mentioned in the above-recited certificate of contract; And all future and

C. Assignment of Land-tax.

conveys unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the said land-tax or sum of £—— so as aforesaid redeemed by the said [*former owner*], and charged upon and issuing and payable out of the said several hereditaments mentioned in the above-recited certificate of contract, as and for the land-tax thereon; And also all powers and remedies for recovering the same (*y*) land-tax, TO HOLD, RECEIVE, AND TAKE the said (*y*) land-tax and premises (*z*) UNTO the said [*purchaser*], his executors and administrators absolutely.

Habendum.

IN WITNESS, &c. (*a*).

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growing yearly and other payments of the said fee-farm rent or sum; Together with," &c.

(*y*) "yearly fee-farm rent."

(*z*) "UNTO AND TO THE USE OF the said [*purchaser*], his heirs and assigns."

Redemption of land tax.

(*a*) The first general land-tax redemption Act was the stat. 38 Geo. 3, c. 60, which was repealed by the 42 Geo. 3, c. 116, the provisions of which Act are for the most part in force at this day. As, however, much land-tax was redeemed under the repealed Act, it is still sometimes necessary, in the examination of titles, to have recourse to it, to ascertain the sufficiency of contracts for redemption. One respect in which this Act materially differed from the present was, that land-tax purchased under it continued to be payable to the Receiver-General as before, and was paid by him to the purchaser, to whose representatives it went as personal estate, whereas it will be seen that, under the present Act, a person purchasing the land-tax is entitled to a fee-farm rent out of the lands, equal to the amount of the land-tax, and which devolves upon his representatives as *real* estate. Where, however, land-tax is redeemed by a person being a limited owner out of his own monies, whether under the stat. 38 Geo. 3, c. 60, or the 42 Geo. 3, c. 116, the land-tax so redeemed is personal estate.

The subsequent Acts are the stats. 54 Geo. 3, c. 70; 57 Geo. 3, c. 100; 1 & 2 Vict. c. 57; 16 & 17 Vict. c. 74; 16 & 17 Vict. c. 117; 19 & 20 Vict. c. 80. By the Land-Tax Redemption Acts, powers are given to the owners of lands charged, and under certain regulations to the owners of partial interests in the lands, guardians, &c., to contract for and effect the absolute redemption of the land-tax.

By sect. 21 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the redemption of land-tax is authorized as a proper mode of applying capital monies arising under the Act. As to merger of land-tax, see *Blundell* v. *Stanley*, 3 De G. & S. 433; *Neame* v. *Moorsom*, L. R. 3 Eq. 91.

Rent-charge is a parliamentary tax.

The rent-charge in lieu of the land-tax is included as a Parliamentary tax in a covenant by a lessor to pay "all Parliamentary, parochial, and other taxes, tithes, and assessments": *Christ's*

CI. *ASSIGNMENT of the* Goodwill *and* Plant *of a* Trade *or* Business *in consideration of a Sum of Money to be paid by Instalments, with appropriate Covenants* (*b*).

Parties.

THIS INDENTURE (*c*), made the —— day of ——, 18—, Between [*vendor*], of, &c., of the one part, and [*purchaser*],

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Hospital v. *Harrild*, 3 Scott, N. R. 126 ; see *Baker* v. *Greenhill*, 2 Ga. & D. 435.

As to the liability of owners of fee-farm rents to contribute to the land-tax.

The adjustment of the proportions of the land-tax between the owner of land and of a fee-farm rent issuing out of it, must, it is obvious, be a source of frequent dispute. By stat. 38 Geo. 3, c. 60, sect. 16, and 42 Geo. 3, c. 116, sect. 35, therefore, power is given to the Commissioners to adjust these proportions. Another question which sometimes arises is, whether the person creating the charge intended the donee to take it exempt from any deduction on account of land-tax. Upon this point it has been held, that where A. granted a fee-farm rent to B., "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee was not liable to land-tax, under stat. 4 W. & M. c. 1, the provisions of which are transcribed into the subsequent Acts: *Bradbury* v. *Wright*, Doug. 624.

Goodwill.

(*b*) As to the nature of goodwill, see *ante*, p. 365, and see sub tit. Partnerships, *ante*, Vol. IV., pp. 313 *et seq.*

This deed may if desired be made to include the assignment of any leasehold premises in which the business is carried on. In that case the recital of agreement for sale will mention the leaseholds among the property to be sold, and the assignment of the leaseholds and of any fixed machinery and fixtures will form the first operative part, and will be followed by covenants by the purchaser to pay the rent and observe the covenants, &c., of the lease, and the covenant to indemnify will include actions, proceedings, &c., in respect of non-payment and non-observance of the rent and covenants. Or the leaseholds may be separately assigned by endorsement on the leases, or otherwise: see Precedents IX. and X., *ante*, pp. 390, 392.

Stamp.

(*c*) Goodwill is property within the meaning of the Stamp Act, 1870: see *Potter* v. *Commissioners of Inland Revenue*, 10 Exch. 147. The *ad valorem* duty may, however, be saved by omitting all mention thereof in the recitals and assignment, and reducing the amount of the consideration expressed to be paid accordingly, if the purchaser is content to rely on the vendor's covenants without taking an assignment of the goodwill.

A further reduction in the amount of the *ad valorem* duty may be effected by omitting the movable machinery, plant, &c., from the assignment and transferring them by delivery, apportioning the purchase-money accordingly: as to which see sect. 74 of the Stamp Act, 1870, *ante*, p. 371. The delivery of the chattels should be recited so that this deed, so far as they are concerned, would apparently be a "memorandum made for or relating to the

CI. Assignment of Goodwill, &c., of Business.

of, &c., of the other part: WHEREAS the said [*vendor*] has for several years past carried on a trade and business as a ——, and is at the date hereof engaged in the same trade and dealing: AND WHEREAS it has been agreed between the said [*vendor*] and [*purchaser*] that in consideration of the sum of 300*l.*, to be paid to him by the said [*purchaser*] at the time of the execution of these presents, and of the further sum of 250*l.* agreed to be paid to him by the said [*purchaser*] on the 31st day of December, 18—, together with interest for the same after the rate of 5*l.* per centum per annum in the meantime, to be paid by equal half-yearly payments, on the 30th day of June, and 31st day of December, 18—, and to be secured by the bond or obligation of the said [*purchaser*]; and also of the like sum of 250*l.*, also agreed to be paid to him the said [*vendor*], by the said [*purchaser*], on the 31st day of December, 18—, with interest for the same after the rate aforesaid in the meantime, to be paid on the 30th day of June and on the 31st day of December in each of the years 18— and 18—, and also to be secured by the said bond or obligation of the said [*purchaser*], and also in consideration of such further and contingent payment by the said [*purchaser*] as is hereinafter mentioned, he, the said [*vendor*], shall sell, and the said [*purchaser*] shall purchase, the good-will of the trade and business of the said [*vendor*]; and also of the machinery, plant, utensils, manufactured and unmanufactured goods, and materials and stock in trade used in the said trade or business, and now the property of the said [*vendor*], and specified in the first schedule hereunder written, and of the book debts owing to the said [*vendor*], the particulars whereof are specified in the second schedule hereunder written, and the benefit of all contracts and orders which the said [*vendor*] has entered into for the supply of goods manufactured or sold by him; And for effectuating the before-mentioned sale, and the agreement between them, the said [*vendor*] and [*purchaser*] have agreed to enter into the covenants on their respective parts hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 300*l.* now paid to the said [*vendor*]

Recitals:

of vendor's trade:

contract for sale, in consideration of money to be paid by instalments, and secured by bond.

Testatum.

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sale of goods, wares, or merchandise" within the exemption in the schedule to the Act, sub tit. AGREEMENT: see *Horsfall* v. *Key*, 2 Exch. 778; *Phillips* v. *Gibbons*, 5 W. R. 527.

CI. Assignment of Goodwill, &c., of Business.

In consideration of money paid, and future instalments secured by bond,

by the said [*purchaser*], the receipt whereof the said [*vendor*] hereby acknowledges, and also in consideration of the further sums of 250*l.* and 250*l.*, and interest thereon respectively, agreed to be paid to the said [*vendor*] by the said [*purchaser*], at the times and in manner hereinbefore mentioned, and secured by the bond of the said [*purchaser*], bearing even date herewith, as the said [*vendor*] doth hereby admit; and also, in consideration of the covenant on the part of the said [*purchaser*] hereinafter contained, he, the said [*vendor*],

vendor assigns trade.

hereby assigns and as beneficial owner conveys unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the before-mentioned trade or business of a —— of him the said [*vendor*], and the good-will thereof, and all benefit and advantage thereof, and also all the said machinery, plant, utensils, manufactured and unmanufactured goods and materials, stock in trade, chattels and effects, and book debts, and also all the interest of him the said [*vendor*], in

Habendum.

the said contracts or orders (*d*): TO HAVE, RECEIVE, AND

Apprentices.

(*d*) Add, if required—

"And also all the benefit of the services of all and every such persons as now are the apprentices of the said [*vendor*], for and during such term, respectively, as each such respective apprentice by his indenture of apprenticeship is obliged to serve; the said [*purchaser*], his executors and administrators, during such service, instructing them in the said trade or business, and providing, at his or their own costs, for their meat, drink, washing, and lodging, and performing all other the duties of a master to an apprentice."

Power of attorney.

The purchaser should, if possible, protect himself by giving notice of this assignment to the persons interested in the contracts and orders, and also to the persons from whom the book debts are owing. If this is done no power of attorney will be necessary: see the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (b). Otherwise a power of attorney should be here added, which may be as follows:—

"TOGETHER with full power in the name of the said [*vendor*], his executors or administrators, or otherwise, to sue for, demand, recover, enforce, and receive payment of, and give effectual receipts or discharges for, all or any of the said book debts and any damages, costs, charges, and expenses, which may become recoverable or payable in relation to all or any of the said contracts or orders."

CI. Assignment of Goodwill, &c., of Business.

ENJOY all the said premises, unto, and by the said [*purchaser*], his executors, administrators, and assigns, absolutely: AND the said [*vendor*] hereby covenants with the said [*purchaser*], that he, the said [*vendor*], his executors and administrators, will, by writing and circulating letters, and by personal introduction and other practicable means, use and exercise his and their best endeavours to introduce the said [*purchaser*] to, and procure for him the custom of, all the present and late customers and friends who have been in the habit of employing and dealing with him, the said [*vendor*], in his said trade or business; AND ALSO will, forthwith or within —— from the date hereof, deliver unto the said [*purchaser*] a written list of the present and former customers of, and dealers with him, the said [*vendor*]; AND ALSO that he, the said [*vendor*], will not, at any time or period within —— years from the date hereof, or within —— miles of the city of London, either by himself or in partnership with any other person or persons, directly or indirectly, engage or be concerned in the trade or business of a ——, without the previous written consent of the said [*purchaser*]; AND THAT if he, the said [*vendor*], shall make default in, or act contrary to, such lastly expressed covenant, he, the said [*vendor*], his heirs, executors, or administrators, will pay unto the said [*purchaser*], his executors, administrators, or assigns, the sum of 1000*l.* as liquidated and stipulated damages; AND ALSO that he, the said [*vendor*], his executors or administrators, will or shall, for the term of one whole year, to be computed from the date hereof, personally assist the said [*purchaser*] in transacting and carrying on the trade or business, by receiving orders for the said [*purchaser*], at his, (the said [*vendor*]'s) present dwelling-house or residence at ——, or at any other dwelling-house which he may for the time being occupy, and transmitting such orders, as the same shall from time to time be received, unto the said [*purchaser*] at his place of business, with all practicable dispatch; AND ALSO that the said [*vendor*], his executors and administrators, will permit and suffer (*e*) the said [*purchaser*], his executors,

Vendor covenants to introduce purchaser to customers;

to deliver list of customers;

not to carry on trade within a certain district;

stipulated damages for default;

during one year to receive orders;

to allow purchaser to use vendor's name.

(*e*) This is a special provision which may involve the vendor in serious liabilities, and is only to be justified by the nature of the business and the restrictions subsequently introduced. As to the right of the purchaser of a business to use the vendor's name, see *Levy* v. *Walker*, 10 Ch. D. 436.

CI. Assignment of Goodwill, &c., of Business.

administrators, or assigns, to use and associate the name of him (the said [*vendor*]) with the name or names of the said [*purchaser*], his executors, administrators, or assigns, in the said trade or business, in all sales of coal or coke by the said [*purchaser*], his executors, administrators, or assigns, in order and to the intent to promote the welfare of the said [*purchaser*], his executors, administrators, or assigns: Vendor not to attend to business, or be answerable as partner. But it is hereby expressly agreed and declared that the said [*vendor*] is not to be under any obligation to attend at the wharf and premises at ——, where he [*vendor*] lately carried on his said hereby assigned trade or business, and that the said [*vendor*] is not to be considered as a partner with the said [*purchaser*], his executors, administrators, or assigns, or in any manner to participate with him or them in the fruits or profits of the hereby assigned trade or business, or be subject to any debts, losses, charges, damages, or expenses, on account or by reason or means thereof, but is to be indemnified therefrom by the said [*purchaser*], his heirs, executors, administrators, or assigns: Purchaser covenants to indemnify vendor from consequences of permission to use his name; And also that the said [*purchaser*], his heirs, executors, administrators, and assigns, will and shall, from time to time and at all times hereafter, keep the said [*vendor*], his executors and administrators, from and against all actions, proceedings, costs, charges, demands, and expenses whatsoever, which shall or may be instituted, sustained, or occasioned, for or by reason of the said [*vendor*] having permitted the said [*purchaser*], his executors, administrators, and assigns, to use and associate the name of the said [*vendor*] with the name or names of the said [*purchaser*], his executors, administrators, or assigns, in the conduct and management of the said trade or business as aforesaid, or in any sales of —— which may be made and transacted by the said [*purchaser*], or for or by reason of the non-performance or non-execution of the said contracts and orders, or any of them: not to use vendor's name in purchases; And also that he, the said [*purchaser*], his executors, administrators, or assigns, will not, at any time henceforth, use or associate the name of the said [*vendor*] in any purchases which may be made by the said [*purchaser*], his executors, administrators, or assigns, in consequence of or relative to the said trade or business, but will contract for and purchase the same in the sole name and on the sole account of the said [*purchaser*], his executors, administrators, or assigns; And that it shall

CI. Assignment of Goodwill, &c., of Business.

be lawful for the said [*vendor*], or his agents, executors, or administrators, to inquire of persons with whom the said [*purchaser*] may deal for ——, or as to their manner of dealing with, and the nature of their charges to, the said [*purchaser*], his executors, administrators, or assigns, and to give to them such notice or notices as may be requisite, in order that the said [*vendor*] may not be subject to or charged with the contracts, purchases, and dealings of the said [*purchaser*], his executors, administrators, and assigns; And further, that in case the profits which may be derived and realized by the said [*purchaser*] from the said trade or business shall, within the first year, to be computed from the date hereof, amount to the amount of £——, then the said [*purchaser*], his executors or administrators, will, on the —— day of ——, 18—, pay unto the said [*vendor*], his executors, administrators, and assigns, the further sum of 100*l.*, free from all deductions, in addition to the prices or considerations hereinbefore expressed to be paid or secured to be paid to the said [*vendor*]. (*Provisions for statement of accounts, vide ante*, Vol. IV., p. 385, *mutatis mutandis*).

if profits exceed a certain sum, to pay additional consideration.

In witness, &c. (*f*).

The First Schedule above referred to.

The Second Schedule above referred to.

(*f*) This Precedent is of a comparatively simple nature; various provisions for special circumstances may be framed from the clauses in some of the Precedents under the title Partnership, *ante*, Vol. IV.

Reference to other forms.

CII. *ASSIGNMENT of the* BENEFIT *of an* AGREEMENT *for a* BUILDING LEASE; *and Materials, Plant, &c.* (*g*).

Partie.

Recitals: of agreement for lease.

THIS INDENTURE (*h*), made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the one part, and [*purchaser*], of, &c., of the other part: WHEREAS, by an agreement dated the —— day of ——, 18—, and made between [A. B.] of the one part, and the said [*vendor*] of the other part, in consideration of the rents, covenants, and conditions hereinafter mentioned or contained, the said [A. B.] agreed to let unto the said [*vendor*], ALL THAT piece or parcel of ground,

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As to assigning agreement for a lease.

(*g*) As to whether the benefit of an agreement for a lease is assignable, or, in other words, whether the assignee of such an agreement can enforce specific performance of it against the lessor: see observations, *ante*, Vol. III., p. 109. Of course, a formal assignment is not necessary for this purpose; an agreement in writing would be sufficient, which might be shortly expressed by indorsement, thus:—

Short precedent of indorsed agreement.

"MEMORANDUM OF AGREEMENT, made this —— day of ——, BETWEEN the within-named [*vendor*] of the one part, and [*purchaser*], of, &c., of the other part: WHEREBY, in consideration of 20*l.* this day paid by the said [*purchaser*] to the said [*vendor*], the receipt whereof the said [*vendor*] hereby acknowledges, the said [*vendor*] hereby absolutely sells and transfers to the said [*purchaser*] the benefit of the within-written agreement, and of all covenants and stipulations entered into with the said [*vendor*], and of all remedies for enforcing the same, and agrees, at the expense of the said [*purchaser*], to do all necessary acts and things for obtaining from the within-mentioned [A. B.] a grant to the said [*purchaser*] of the lease by the said agreement agreed to be granted to the said [*vendor*]: AND the said [*purchaser*] hereby agrees with the said [*vendor*] to perform and observe all the covenants, conditions, and stipulations on the part of the said [*vendor*] contained in the said agreement, and to indemnify him from all actions, proceedings, damages, costs, expenses, claims, and demands, by reason of his the said [*purchaser's*] non-performance or non-observance thereof.

"AS WITNESS, &c."

Stamp.

(*h*) As to stamp duty with respect to the materials, &c., see *ante*, p. 664, note (*c*).

CII. Assignment of Agreement for Lease.

&c. [*describe parcels*]: And the said [*vendor*] thereby agreed to erect on the said piece or parcel of ground —— good, substantial brick-built dwelling-houses, of an uniform elevation, conformably in every respect to a drawing or plan mentioned to have been exhibited to him for that purpose, the said houses to be built in a workmanlike manner, with good and substantial materials of every kind, to the approbation of the surveyor for the time being of the said [A. B.], and to be covered in within —— calendar months from the date of the agreement now in recital; and that the said [*vendor*], his executors, administrators, or assigns, would immediately insure the said houses in the —— Fire Insurance Office to the full value thereof: And the said [A. B.] thereby agreed, when the said houses should be covered in, to grant a lease to the said [*vendor*] of the said piece or parcel of land from the —— day of ——, 18—, for the term of —— years, at the yearly rent of £——, to be paid on the usual quarter-days, and the first payment thereof to be made on the —— day of ——, 18—, without any deduction whatsoever, except for landlord's property tax; and it was thereby agreed that the said lease should be prepared by the solicitors of the said [A. B.], at the cost of the said [*vendor*], and should contain all the customary covenants, provisoes, conditions, and restrictions usually inserted in leases of a similar nature (*i*): And whereas the said —— dwelling-houses so agreed to be built by the said [*vendor*] as aforesaid have been partly erected by him, but are not yet covered in: And whereas the said [*purchaser*] has agreed with the said [*vendor*] for the purchase of the benefit of the said agreement, and the materials, utensils, and plant hereinafter described and hereby assigned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum the said [*vendor*] hereby acknowledges the receipt, He the said [*vendor*] hereby assigns, and as beneficial owner conveys unto the said [*purchaser*], his executors, administrators, and assigns, All that the hereinbefore-recited agreement of the —— day of ——, and all benefit thereof: And also all materials, utensils, and plant,

of commencement of houses;

of agreement for purchase.

Testatum.

(*i*) As to what are "usual covenants" in leases, see sub tit. Leases, *ante*, Vol. III., pp. 116 *et seq.*

CII. Assignment of Agreement for Lease.

the property of the said [*vendor*], and now being upon or in the said piece or parcel of land so agreed to be leased as aforesaid, and used or intended to be used for the purposes of or in relation to the erection of the said dwelling-houses, To

Habendum.

HOLD the said agreement, and all other the premises hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, for his and their absolute benefit; subject nevertheless to the observance and performance on the part of the said [*purchaser*], his executors, administrators, and assigns, of the several covenants, stipulations, and agreements, in the said agreement contained, on the part of the said [*vendor*], his executors or administrators, to be performed, or such of the covenants, agreements, and stipulations, as are now unperformed or capable of taking effect (*k*):

Covenant by vendor to use his best endeavours to procure lease to be granted to purchaser.

AND the said [*vendor*] hereby covenants with the said [*purchaser*] in manner following, that is to say, that he the said [*vendor*] hath not at any time heretofore made, done, executed, or knowingly suffered any act, deed, matter, or thing whatsoever, by means whereof he is prevented from effectually assigning the aforesaid articles of agreement and premises, in manner aforesaid, and that he the said [*vendor*], his executors or administrators, will, on the request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, use his and their best endeavours to induce and procure the said [A. B.] to grant a lease of the said

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(*k*) If thought advisable, a power of attorney may be here inserted as follows:—

Power of attorney to sue on agreement.

"AND, for the consideration aforesaid, the said [*vendor*] hereby irrevocably appoints the said [*purchaser*], his executors and administrators, the true and lawful attorney and attornies of him the said [*vendor*], for him and in his name, or otherwise, but at the costs and for the benefit of the said [*purchaser*], his executors or administrators, to demand, recover, receive, and give effectual receipts or discharges for any monies which are or may become payable, and to bring or institute any action or other proceeding, and to give any notices under or by virtue of the said agreement, as by the said [*purchaser*], his executors or administrators, shall be deemed expedient; And for all or any of the purposes aforesaid to appoint a substitute or substitutes, and such substitution from time to time at pleasure to revoke."

piece or parcel of ground to the said [*purchaser*], his executors, administrators, or assigns (*l*): And the said [*purchaser*]

CII. Assignment of Agreement for Lease.

(*l*) As there is doubt whether a person having an agreement for a lease can insist upon its being granted to his nominee, sometimes a clause is inserted in an assignment of such an agreement, obliging the vendor to take a grant of the lease to himself, if required by the lessor so to do, and assign it over to him as follows:—

Covenant by purchaser to perform the stipulations of the contract;

Agreement that vendor shall take the lease if required.

"And that in case the said [A. B.] shall refuse or decline to grant to the said [*purchaser*], his executors or administrators, the lease agreed to be granted by him to the said [*vendor*] as aforesaid, but shall require the same to be accepted and taken by the said [*vendor*], his executors or administrators, then that the said [*vendor*], his executors or administrators, will or shall accept and take such lease accordingly, and will immediately thereupon, on the request and at the costs of the said [*purchaser*], his executors, administrators, or assigns, effectually assign the same, and the said piece or parcel of ground and premises therein to be comprised, unto the said [*purchaser*], his executors, administrators, or assigns, for his and their use and benefit, for all the estate, term, and interest, so to be granted to the said [*vendor*], his executors, administrators, or assigns therein as aforesaid, provided that he the said [*purchaser*], his executors or administrators, shall pay to the said [*vendor*], his executors or administrators, the costs and expenses which he or they shall have incurred in obtaining such lease and the counterpart thereof, and shall indemnify him and them from all damages, costs, and expenses, by reason of the covenants which shall have been entered into by the said [*vendor*], his executors or administrators, in such lease so taken by him or them as aforesaid."

The insertion of clauses of this nature must not be considered as of course, for a vendor would generally object, under such circumstances, to subject himself to the rent and covenants of the lease, and take the purchaser's personal indemnity against those covenants. Another mode sometimes resorted to for effecting the object is to authorize the purchaser to accept a lease and execute the counterpart in the name of the vendor. It should be observed that, as the only ground for these expedients is the doubt whether the performance of the contract could be enforced by a nominee of the intended lessee, if the agreement be express upon this point (*as it always ought to be*), the clauses in question are quite unnecessary. Indeed, it is conceived, that the better opinion is that, even if assigns or nominees were not mentioned in the agree-

CII. Assignment of Agreement for Lease.

hereby covenants with the said [*vendor*] that he the said [*purchaser*], his executors, administrators, or assigns, will henceforth perform and observe all the covenants and stipulations in the hereinbefore-recited agreement expressed, on the part of the said [*vendor*], his executors, administrators, and assigns, to be performed and observed, or such of the said covenants and stipulations as now remain subsisting, unperformed, or capable of taking effect; And will at all times hereafter effectually keep indemnified the said [*vendor*], his heirs, executors, and administrators, of, from, and against the same covenants, stipulations, and agreements, and all actions, proceedings, costs, charges, damages, expenses, claims, and demands whatsoever, for or in respect of the same covenants, stipulations, and agreements, or otherwise in relation thereto (*m*).

and indemnify the vendor in respect thereof.

In witness, &c.

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ment, the lessor would be bound to grant the lease to the nominee of his intended lessee, unless he could show that his security was likely to be diminished by the substitution of such nominee for the party with whom he had contracted. A question of a similar nature would arise on a sub-contract for sale entered into by the purchaser of leaseholds before he had obtained his assignment, namely, whether the vendor was bound to make the assignment to, and accept the covenants of indemnity of the sub-purchaser against the rent and covenants of the lease. According to the above suggestion, he would be bound, unless he could prove the individual proposed to be objectionable.

(*m*) Add, if a power of attorney is given—

And also in respect of the power.

"And also for or in respect of the power or authority hereinbefore given to the said [*purchaser*], his executors or administrators, or any actions or other proceedings, which may be brought or instituted by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, by virtue thereof, or otherwise in relation thereto."

CIII. *ASSIGNMENT of a* BOND-DEBT.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of, &c., of the one part; and [*purchaser*], of, &c., of the other part: WHEREAS by a bond or obligation dated the —— day of —— last, under the hand and seal of [*obligor*], of, &c., the said [*obligor*] became bound unto the said [*vendor*] in the sum of £——, conditioned for the payment unto the said [*vendor*], his executors or administrators, of the sum of £——, and interest thereon, at the rate of —— per centum per annum, from the day of the date thereof, on the —— day of ——, then next ensuing; AND WHEREAS the said principal sum of £—— remains owing to the said [*vendor*], together with interest thereon from the —— day of ——; AND WHEREAS the said [*purchaser*] has agreed with the said [*vendor*] for the purchase of the said bond-debt, at the price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum the said [*vendor*] hereby acknowledges the receipt, he the said [*vendor*] hereby assigns and, as beneficial owner, conveys unto the said [*purchaser*], ALL THAT the hereinbefore recited bond or obligation, and all interest now due, or hereafter to become due for the same, and the full benefit thereof, and of all securities for the said debt, TO HOLD AND RECEIVE the premises hereby assigned unto the said [*purchaser*], his executors or administrators absolutely (*n*).

Parties.

Recitals: of bond;

of debt being due;

of contract for purchase.

Testatum.

Habendum

IN WITNESS, &c.

(*n*) Notice of this assignment must be given to the debtor. If this is done, no power of attorney to use the name of the assignor will be necessary: see the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (6). The suggestions as to the precautions to be taken by a mortgagee of a debt apply for the most part to a purchaser: see *ante*, sub tit. MORTGAGES, Vol. III., p. 817.

CIV. *ASSIGNMENT of a* POLICY *of Life* ASSURANCE *by a* VENDOR *to a* PURCHASER (*o*).

Parties. THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of, &c., of the one part; and [*purchaser*], of, &c., of the other part: WHEREAS by a policy of assurance dated the —— day of ——, under the hands and seals of three of the directors of the —— Assurance Society, and numbered ——, the sum of £—— is assured to the executors, administrators, or assigns, of the said [*vendor*], within —— months after his decease, subject to the payment of the annual premium of £—— during the life of the said [*vendor*]; AND WHEREAS the said [*purchaser*] has agreed with the said [*vendor*] for the absolute purchase of the said policy of assurance at the price of £——. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum the said [*vendor*] doth hereby acknowledge the receipt, he the said [*vendor*] hereby assigns and, as beneficial owner, conveys unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT the hereinbefore recited policy of assurance, And the said sum of £—— thereby assured, and all sums of money, advantages, and benefits which may become payable or receivable under or by virtue of the same policy, TO HAVE, RECEIVE, AND TAKE the said policy of assurance and premises hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, for his and their own absolute use and benefit, subject to the payment of all future premiums henceforth to become due in respect of the said policy; AND the said [*vendor*] hereby covenants with the said [*purchaser*] that the hereinbefore recited policy of assurance is now in force and valid for the said sum of £—— thereby expressed to be assured, and for all bonuses and additions, if any, which have been added thereto; And that he the said [*vendor*] will not hereafter do or knowingly omit or suffer any act or thing (except so far as respects the

Recitals: of policy; of contract for purchase. *Testatum.* Assignment. Policy. *Habendum.* Covenants by vendor: that policy is in force; not to occasion any forfeiture;

(*o*) Notice in writing of this assignment must be given to the assurance office, at their principal place of business: see the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144). And see further as to assignments of policies of life assurance, *ante*, sub tit. MORTGAGES, Vol. III., p. 827 *et seq.*

CIV. Assignment Policy of Life Assurance.

payment of the future premiums to become due in respect of the said policy), by means whereof the said policy of assurance shall become void or voidable, or whereby the said [*purchaser*], his executors, administrators, or assigns, shall be defeated or prejudiced in receiving the said sum of £—— assured thereby, or any such bonuses or additions as aforesaid; And that, in case he the said [*vendor*] shall hereafter go beyond the seas, or do, omit, or suffer any other act or thing by reason whereof the premium payable in respect of the said policy shall be increased beyond the said annual sum of £——, then he the said [*vendor*], his executors or administrators, will pay such additional premium, and effectually indemnify the said [*purchaser*], his executors, administrators, and assigns, from all loss or damage in respect thereof (*p*).

to pay any additional premium for going abroad, &c.

In witness, &c.

(*p*) The propriety of this covenant depends on the nature of the agreement between the parties. If the vendor does not go the length of contracting to pay any additional premium which his departure from England might occasion (which is certainly not of course), he ought at least to stipulate not to leave the country without notice, and without affording the purchaser an opportunity of paying the additional premium. The covenant would then be varied as follows:—

As to vendor's covenant not to leave the kingdom.

"And that he the said [*vendor*] will not at any time hereafter go or travel to any place or places out of Great Britain, or do, omit, or suffer any act or thing whereby any additional or increased premium or payment may become payable in respect of the said policy, or change his place of residence, without giving previous notice or intimation in writing of his intention so to do, to the said [*purchaser*], his executors, administrators, or assigns, so as to afford him or them an opportunity of paying any additional premium or premiums, which according to the terms of such policy would become payable in that event; and that the executors or administrators of him the said [*vendor*] will, within —— days after his death, give notice or information in writing thereof to the said [*purchaser*], his executors, administrators, or assigns, by letter sent through the post to his or their usual or last known place of residence in England."

Sometimes, by the terms of the policy, an additional premium becomes payable on entering into active military or naval service. The draughtsman will, of course, in every case frame the stipulation with reference to the particular terms of the policy in question.

CV. *ASSIGNMENT by way of* SALE *of a* LEGACY (*q*).

THIS INDENTURE, made the —— day of ——, 18—,
Parties. BETWEEN [*vendor*], of, &c., of the one part: WHEREAS
Recitals: of will; [*testator*], late of, &c., the father of the said [*vendor*], by his will dated the —— day of ——, 18—, bequeathed unto each of his children the sum of £——, to be paid to them when they should respectively attain the age of twenty-one years, and appointed [*executor*] the sole executor
of death of testator and probate; of his said will: AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, without having revoked or altered his said will, which was on the —— day of ——, 18—, duly proved by the said [*executor*] in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice:
that, vendor has attained 21 years; AND WHEREAS the said [*vendor*], one of the children of the said [*testator*], deceased, attained the age of twenty-one years
of agreement for purchase of legacy. on the —— day of ——, 18—: AND WHEREAS the said legacy of £——, to which he is so entitled as aforesaid, has not yet been paid, and the said [*purchaser*] has agreed with the said [*vendor*] for the purchase of the same at the price
Testatum. of £——: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*vendor*] by the said [*purchaser*], of which sum the said [*vendor*] hereby acknowledges the receipt, he, the said [*vendor*], hereby assigns, and as beneficial owner conveys unto the said [*purchaser*], his executors, administrators, and assigns,
Parcels, legacy. ALL THAT the legacy or sum of £——, so bequeathed to him, the said [*vendor*], by the hereinbefore recited will of the said [*testator*], deceased as aforesaid, and all monies to become due and payable in respect of the said legacy, with all powers and remedies for the recovery

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(*q*) Variations where the assignment is of a reversionary undivided share in general personal estate, and where it is of a fund in Court, will be found, *ante*, sub tit. MORTGAGES, Vol. III., p. 1127. Such variations are as applicable to an assignment by way of sale as to a mortgage.

Notice of this assignment should be given to the executor, or to the trustees, as the case may require.

thereof; To HOLD the said legacy and premises hereby assigned unto the said [*purchaser*], his executors, administrators, and assigns, for his and their absolute use and benefit. CV. Assignment of Legacy. *Habendum.*

IN WITNESS, &c.

CVI. *ASSIGNMENT by way of* SALE *of an unpaid* PORTION, *and of a* TERM *for securing the same, to the* TRUSTEES *of an* ASSURANCE SOCIETY. COVENANT *by* TENANT FOR LIFE *to pay* INTEREST *on the Portion till payment.* PROVISO *that the* PAYMENT *of the Portion shall* NOT *be* REQUIRED *for twenty years, if the Tenant for Life shall so long live* (*r*).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*portionist*], of, &c., of the first part; [*tenant for life*], of, &c., of the second part; [*trustee of portions-term*], of, &c., of the third part; [*trustee of Ass. Soc.*], of, &c., and [*other trustee of Ass. Soc.*], of, &c., of the fourth part; and [*assignee of term*], of, &c., of the fifth part: WHEREAS [*recite marriage settlement, limiting hereditaments* (*describing parcels at length or by reference to a schedule*) *to trustees for one thousand years on trust, to raise portions amounting to* 12,000*l.*, *as the then intended husband should appoint; the marriage; the death of the wife; deed poll by the surviving husband appointing a portion of* 4000*l. to a younger son, the portionist; the death of the appointor; deed poll by other children of the marriage, reciting appointments and payment of their portions, and releasing the estate therefrom; and the death of one of the trustees of the portions-term*]: AND WHEREAS, by virtue of divers assurances and acts in the law, Parties. Recitals:

(*r*) For a form of mortgage of settled lands by trustees of a term, to raise portions for younger children, see *ante*, sub tit. MORTGAGES, Vol. III., p. 1041.

CVI. Assignment by Way of Sale of Unpaid Portion.

and ultimately under or by virtue of an indenture of settlement, dated, &c., and made, &c., the said [*tenant for life*] is now entitled, as tenant for life in possession, to the hereditaments comprised in the hereinbefore recited indenture of settlement of the —— day of ——, subject (among other things) to the said sum of 4000*l.* so appointed to the said [*portionist*] as aforesaid, and to the said term of 1000 years for securing the same: And whereas the said sum of 4000*l.*, so payable upon the death of the said [*appointor*] as aforesaid, is still due and owing to the said [*portionist*], who has recently required the same sum to be raised and paid to him, pursuant to the said indenture of settlement of the —— day of ——, 18—; And whereas, at the request of the said [*tenant for life*], it has been agreed between the said [*portionist*] and [*trustees of Ass. Soc.*], that the said [*trustees of Ass. Soc.*] shall purchase the said portion or sum of 4000*l.* so unpaid as aforesaid, and take a transfer thereof and of the securities for the same in manner hereinafter appearing, and that these presents shall contain the covenant on the part of the said [*tenant for life*] and provisions hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 4000*l.* now paid to the said [*portionist*], at the request and by the direction of the said [*tenant for life*] (testified by his execution of these presents), by the said [*trustees of Ass. Soc.*], out of moneys belonging to them on a joint account, of which sum of 4000*l.* the said [*portionist*] and [*tenant for life*] acknowledge the receipt and payment in manner aforesaid respectively; he, the said [*portionist*], at the request of the said [*tenant for life*] (testified as aforesaid) hereby assigns, and, as beneficial owner, conveys unto the said [*trustees of Ass. Soc.*], their executors, administrators, and assigns, All that the said sum of 4000*l.*, being the said part or share appointed to or in favour of the said [*portionist*], in and by the hereinbefore recited deed poll of the —— day of ——, 18—, of and in the said sum of 12,000*l.* provided by the said indenture of settlement of the —— day of ——, 18—, for the portions of the younger sons and of the daughters of the said [*appointor*] and [*wife*], his wife, respectively, deceased as aforesaid; Together with all interest henceforth to become due in respect thereof; To

of title of tenant for life subject to portions term;

of requisition for payment of portion;

of agreement for purchase of portion.

Testatum.

Assignment of portion.

Parcels.

Habendum.

HOLD all the premises hereby assigned unto the said [*trustees of Ass. Soc.*], their executors, administrators, and assigns, absolutely: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement and in consideration of the premises, he, the said [*trustee of portions-term*], at the request and by the direction of the said [*portionist*] and also of the said [*tenant for life*], testified respectively as aforesaid, hereby assigns, transfers, and as trustee conveys unto the said [*assignee of term*], his executors, administrators, and assigns, ALL THOSE the said manors, messuages, lands, tenements, tithes, tithe rentcharges, and hereditaments hereinafter described [*or*, described in the schedule hereunder written] and comprised in, and granted or assured by the said indenture of settlement of the —— day of ——, 18—, EXCEPT such and so many and such part and parts of the same hereditaments and premises (if any) as have been sold or given in exchange, in exercise of the powers of sale and exchange contained in the same indenture, or have been sold, given in exchange, extinguished, awarded, allotted, assigned, or otherwise disposed of, under any Act or Acts relating to settled lands or estates, or inclosures, or commutation of tithes, or otherwise; AND ALSO, by way of conveyance and not of exception, All and singular the messuages, lands, tenements, rentcharges, or shares of rentcharges and hereditaments, which, under the powers contained in the last-mentioned indenture, or any of them, or under the powers or provisions of any Act or Acts of Parliament, or otherwise, purchased, taken in exchange, awarded, allotted, assigned, or substituted in anywise for any of the said manors, messuages, lands, tenements, tithes, tithe rentcharges, hereditaments and premises, comprised in the said indenture of settlement of the —— day of ——, 18—, and which are now respectively subject to the uses, limitations, and provisions of the same indenture; AND ALSO, by way of conveyance and not of exception, All capital and other moneys, and the securities for, and investments of, all moneys (if any)

CVI. **Assignment by Way of Sale of Unpaid Portion.**

Second *Testatum.*

Assignment of term to trustee.

Parcels.

Exception of lands sold, exchanged, &c.

Inclusion in assignment of lands purchased, taken in exchange, &c.;

and of capital monies (*s*).

(*s*) If at the date of this deed the capital monies are of any material amount, it will be prudent to give notice of this assignment to the trustees of the settlement: see *ante*, sub tit. MORTGAGES, Vol. III., p. 953 *et seq.*

CVI. Assignment by Way of Sale of Unpaid Portion.

arising by or by virtue of any sale or exchange of any of the hereditaments and premises comprised in the last-mentioned indenture, and liable to be laid out or applied in the purchase of lands, to be settled to the uses and subject to the limitations and provisions of the same indenture, or any of them, or in the improvement or for the benefit of or in relation to the hereditaments and premises comprised in the same indenture; To HOLD all the premises lastly hereinbefore assigned unto the said [*assignee of term*], his executors, administrators, and assigns, henceforth for all the unexpired residue of the said term of 1000 years, so created by the said indenture of settlement of the —— day of ——, 18—, as aforesaid; IN TRUST for the [*trustees of Ass. Soc.*] by way of security to them for the payment of the said sum of 4000*l.*, and interest thereon, so secured by them as aforesaid, and for that purpose to be assigned, surrendered, or otherwise disposed of, as they or the survivor of them, or the executors or administrators of such survivor, or their or his assigns shall direct; AND from and after the payment of the said sum of 4000*l.*, and of all interest henceforth to become due for the same, and in the meanwhile subject thereto, IN TRUST for the person or persons for the time being entitled to the hereditaments and premises comprised in the said indenture of settlement, in reversion or remainder, immediately expectant on the determination of the said term of 1000 years: AND the said [*tenant for life*] hereby covenants with the said [*trustees of Ass. Soc.*] that he, the said [*tenant for life*], will, during his life, so long as the said portion or sum of 4000*l.* hereby assigned, or any part thereof, shall remain unpaid, pay to the said [*trustees of Ass. Soc.*], their executors, administrators, or assigns, interest for the said sum of 4000*l.*, or for so much thereof as shall for the time being remain unpaid, at the rate of —— per cent. per annum, by equal half-yearly payments, on the —— day of ——, and the —— day of ——, in every year; [*Proviso for reduction of rate of interest on punctual payment, if required, ante Vol. III.*, p. 998]; PROVIDED ALWAYS that if the said [*tenant for life*] shall, during his life, so long as the said sum of 4000*l.*, or any part thereof, shall remain unpaid, on every —— day of ——, and —— day of ——, or within —— days next after each of such days respectively, duly pay all interest

Habendum for residue of term.

In trust for purchasers as security;

and subject thereto in trust for persons entitled under settlement.

Covenant by tenant for life for payment of interest.

Proviso that payment of the portion shall not be required during life of tenant for life, &c.

CVI. Assignment by Way of Sale of Unpaid Portion.

payable by him pursuant to the covenant in that behalf on his part hereinbefore contained, then and in such case the said [*trustees of Ass. Soc.*] shall, not before the —— day of ——, 19—, or the death of the said [*tenant for life*], whichever shall first happen, call in the said sum of 4000*l.*, or any part thereof.

IN WITNESS, &c.

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